MATERIALS ON PROPERTY

Part II

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Section 1 AN HISTORICAL INTRODUCTION

> Let me speak first of those fields where there can be no progress without history. I think the law of real property supplies the readiest example.[1]

Prior to 1066 feudalism, in some form, existed in England.[2] The extent to which this had occurred cannot be stated with certainty. Nor for present purposes is it material. For one consequence of the Norman Conquest was the introduction into England of a comprehensive system of feudalism; that is landholding in return for services. William claimed the whole of England as his by right of conquest. His claim to be the legitimate successor to Edward the Confessor had been placed beyond effective contest. The transitional period after the Conquest involved forfeiture and expropriation of lands from those who had opposed the Norman Conqueror. These lands were granted by him to his Norman followers; and there were re-grants of land to those of the English who were willing to recognize him as King.[3] England was "the most perfectly feudalized"[4] of all countries. No land in England was allodial, but every acre was held of the Crown: nulla terre sans seigneur. The word "tenure" signified this relation of tenant to lord;[5] and this concept has been "the backbone of the English system"[6] of landholding.

1. TENURE - THE CONCEPT STATED

Land represented far and away the main source of wealth. Accordingly the scheme was not to grant unqualified rights to possession. The grantees were tenants of the Crown, persons who had a continuing relationship to their Lord, the King:[7]

> All land in the kingdom was holden mediately or immediately of the king, styled the lord paramount; and the great lords, holding immediately under the king, when they granted portions of their lands to others, were still tenants with respect to the king, and were called mesne, or middle, lords.

(1) Cardozo, The Nature of the Judicial Process, (1925), 1st ed., 5th printing, 54.

(2) Generally see, Bl. Comm., vol. ii, (1775), 7th ed., 44-103; Holdsworth, A History of English Law, (1923), vol. iii, 29-87; Pollock and Maitland, The History of English Law, (1898), vol. i, 229-406; Plucknett, A Concise History of the Common Law, (1956), 5th ed., 506-545; Challis, Law of Real Property, (1911), 3rd ed., 4-40; Williams, Principles of the Law of Real Property, (1920), 23rd ed., 12-15, 37-63; Simpson, An Introduction to the History of the Land Law. (1961), 1-23; Hargreaves, An Introduction to the Principles of Land Law, (1963), 4th ed., 5-14, 26-41; Cheshire, The Modern Law of Real Property, (1967), 10th ed., 8-27; Megarry and Wade, The Law of Real Property, (1966), 3rd ed., 13-39; Laskin, Cases and Notes on Land Law, (1964), 5-31; American Law of Real Property, (1952), vol. i, 1-81; Gray, The Rule against Perpetuities, (1942), 4th ed., 15-56, 196-199; Powell, Real Property, (1949), vol. i, 35-66; Moynihan, Introduction to the Law of Real Property, (1962).

(3) See Kavanaugh v. Cohoes Power & Light Corporation, 187 N.Y.S. 216 (1921), where at p. 230 it is stated: "It was by implication of this theory that the king, after the Conquest, granted, regranted, or in effect at least confirmed to the chief men of the kingdom large parcels or tracts of land called feoda in return for services."

(4) Pollock and Maitland, op. cit., 235.

(5) The Attorney-General of Ontario v. Mercer (1883), 8 App. Cas. 767, 772.

(6) Kavanaugh v. Cohoes Power & Light Corporation, 187 N.Y.S. 216, 230 (1921).

(7) Title Guarantee & Trust Co. v. Garrott, 183 P. 470 (1919), at p. 471 per Finlayson P.J. See also In re Stone; Read v. Dubua (1936), 36 S.R. (N.S.W.) 508; discussed (1936), 10 Austr. L.J. 315.

They held of the King in return for certain specified continuing services. It was in this way that the diverse requirements of the Crown, including the maintenance of an army, were ensured. Tenants who held directly of the Crown were termed tenants in chief, or in capite.[8] These people formed the new aristocracy. At the time of the Domesday Book, 1086, they numbered about 1,500 and, save for land retained by the Crown, the whole of England was divided between them.[9] One effect of the Domesday Book was to "assert the chain of feudal relationships and to assure the overlordship of the Crown".[10]

(a) Subinfeudation

At this early date the process of subinfeudation had commenced: indeed, during this period this was the method by which alienation was "apparently almost always, if not entirely",[11] effected. Subinfeudation involved the creation of a new tenure and worked in this way. Land was enfeoffed by the tenants in chief to others to hold of them in return for such services as might be reserved by the act of feoffment. Such grantees from the tenants in chief might in their turn grant land to others in like manner:[12]

> Thus a new tenure was created upon every alienation; and thence there arose a series of lords of the same lands, the first called the chief lords, holding immediately of the sovereign; the next grade holding of them, and so on, each alienation creating another lord and another tenant.

In this way the so-called feudal pyramid was formed, with the Crown at the apex and the tenants in actual possession of land, the tenants in desmesne, at the base. Those who stood between the Crown and the tenants in desmesne were termed mesne lords. That which a mesne lord retained after a grant by way of subinfeudation was known as his seignory:[13]

> The duties owing by each tenant to his superior constituted the tenure of the land, and the corresponding right in each superior was called the seignory.

The seignory comprised mainly the right to receive the services reserved upon the subinfeudation.

(8) The expression "tenant in chief" denoted that no mesne lord existed between the tenant and the King. A tenant who held by direct grant from the Crown was termed a tenant in chief ut de corona. A tenancy in chief ut de honore occurred when the lands of a mesne lord escheated to the Crown. Thus assume A holds of the Crown and subinfeudates to B. If the lands of A escheat to the Crown, B would thereafter hold as tenant in chief, not by direct grant, but as a tenant in chief ut de honore. For some purposes this distinction was material. Discussing Magna Carta (9 Hen. 3) cap. 31, Astbury J. in In re Holliday [1922] 2 Ch. 698, at p. 707 said: "The effect of this was that escheated lands regranted by the Crown - i.e., tenures newly created to be held ut de honore, as distinguished from those held ut de corona, should thenceforth be subject to the same rights, duties, incidents and obligations only, as they had been subject to immediately before the escheat." See Challis, op. cit., 4-5. See Re Bonner (Deceased) [1963] St. R. Qd. 488, 494.

(9) Williams, op. cit., 41-46; Moynihan, op. cit., 7-8.

(10) Plucknett, op. cit., 13.

(11) In re Holliday [1922] 2 Ch. 698, 707. Also see Kavanaugh v. Cohoes Power & Light Corporation, 187 N.Y.S. 217, (1921), where at p. 230 subinfeudation was said to be according to "the custom of the times....."

(12) Van Rensselaer v. Hays, 75 Am. Dec. 278, (1859), at p. 280 per Denio J. delivering the judgment of the New York Court of Appeals.

(13) Kavanaugh v. Cohoes Power & Light Corporation, 187 N.Y.S. 217, 231, (1921).

(b) Services - Intrinsec and Forinsec

Upon subinfeudation the services reserved were intrinsec, that is as agreed by the parties involved and within the scope of their bargain. Services which had already been reserved by the Crown or by a mesne lord were forinsec. Such services arose outside the parties' bargain and were "foreign"[14] to it. They were, in their entirety, charged upon the whole of the land. Thus assume that the Crown granted land to A, a tenant in capite. Assume also that A, by way of subinfeudation, granted part of this land to B to hold of him, A, in return for specified services, and that B in turn granted part of his land to C in like manner. The services reserved to B upon the subinfeudation to C were, as between B and C, intrinsec in their nature. The services due to the Crown (and to A) were forinsec, that is their burden on the land remained unaffected by the bargain between B and C: indeed, so it was conceived, the services were owed by the land. What if a tenant failed to perform his services? As pointed out by Lord Denning in Warner v. Sampson, distress was the usual remedy:[15]

> If a tenant failed to perform the services due to his lord, the lord used to take action to recover them. The usual thing he did was to take the tenant's cattle by way of distress so as to compel the tenant to perform the services.

The writ of mesne enabled the occupant of the land, upon which distress had been levied, to proceed against his immediate lord so as to secure indemnity against forinsec services.[16] Resumption of the land was also possible in early days when felony comprised the deliberate refusal by a tenant to perform his services. When, however, the notion of felony ceased to include this circumstance, absent an agreement so providing, this remedy became unavailable to the lord, a state of affairs which continued until the Statute of Gloucester, 1278.[17]

2. VARIETIES OF TENURES

On a grant of land some service, albeit nominal, seems always to have been reserved:[18]

> The word tenure, in its technical sense, is the manner whereby lands or tenements are holden, or the service that the tenant owes to his lord, and there can be no tenure without some services, because the service makes the tenure.

The service due was specified at the time of the grant, usually in a charter of feoffment. The kind of services which could be reserved upon a grant of land were manifold both in their type and in their nature for there was an absence of fixed legal principles controlling their creation. Whatever they constituted, however, services must have comprised something which was the property of, and which was rendered by, the tenant. Accordingly certain reservations upon a Crown grant have been held not to be services:[19]

> What resemblance exists, between services to be rendered by a grantee, in return for land granted, and

(14) Pollock and Maitland, op. cit., 237-238.
(15) [1959] 1 Q.B. 297, 312. Also see Harpolle v. Carroll (1896), 27 O.R. 240, 247.
(16) Pollock and Maitland, op. cit., 237-239, 352-355; Cheshire, op. cit., 13-14.
(17) Pollock and Maitland, op. cit., 352; Plucknett, op. cit., 536; Megarry and Wade, op. cit., 19; Challis, op. cit., 18-19.
(18) Ford v. Grigsby's Devisees, 2 Ky. Rep. 168, 169, (1802). See also Holdsworth, op. cit., 46: "All the tenures imply service of some sort."
(19) The Attorney General v. Brown (1847), 2 S.C.R., Appendix 30, 40 (N.S.W.).

> things simply omitted to be granted, but retained for himself by the grantor, we have been quite unable to discover. Every service, certain or uncertain, must be something the property of the tenant, rendered by the tenant. But the coals, and timber, and ways, mentioned in the grant in this case, are simply matters withheld; and not only is the tenant not required to render them, but (as to the coals, at least), they have never been his property to render.

The result was the existence of "tenures which range from the ludicrous to the obscene and from the onerous to the nominal".[20] One example illustrative of the range and character of possible services was that of "holding the Head of our said Lord the King, between Dover and Whitsond, as often as he should happen to pass over Sea between those Ports towards Whitsond".[21] In the main, however, the services were designed to fulfill the basic requirements of the Crown.[22] Gradually, as cases involving land became justiciable in the royal courts,[23] the process developed of classifying certain kinds of services into broad general categories. These categories were termed tenures and they indicated the manner in which land was held. By the end of the twelfth century the "great outlines"[24] had been drawn, and it remained for Littleton in or about 1481[25] to present the first systematic treatment of this subject.

The basic division established was between free and unfree tenure. There was, however, a hybrid class of tenants who held in ancient desmesne:[26]

> In a manor of ancient desmesne (and only in such a manor) there were not only two kinds of tenure. There was a third kind of tenure held by a class of persons known as villein socmen. Although villein socmen were villeins, they had many of the rights of a free-holder, including the right of appealing to the common law administered by the King's Court if the customary law as administered by the lord of the manor or his steward was thought to disregard their title or their rights or privileges. Although this was so, yet in many ways they still remain villeins with only the villein's rights.

Tenure in ancient desmesne could exist only in relation to land which belonged to the Crown in the reigns of Edward the Confessor or William I. Yet it has been the subject of recent English judicial discussion.[27]

(20) Simpson, op. cit., 5.
(21) Blount, Ancient Tenures, (1784), 2nd ed., 57. See Simpson, op. cit., 5-6; Megarry, Miscellany-at-Law, (1955), 154-157.
(22) Powell, op. cit., 44-45: "So perhaps we can designate the four fundamental needs of the Norman groups as safety, subsistence, salvation and splendor."
(23) Williams, op. cit., 40, 46.
(24) Pollock and Maitland, op. cit., 240.
(25) Litt., secs. 95-171. It has been put this way: "Littleton regarded tenure as a thing, having somehow an independent and quite sacred existence. He classified tenures with the same intense earnestness as a modern scientist classifies butterflies or mountain ranges. Blackstone followed hard after." - Vance, The Quest for Tenure in the United States, (1924), 33 Yale L.J. 248, 252.
(26) Iveagh v. Martin [1961] 1 Q.B. 232, at pp. 261-262 per Paull J. See Holdsworth, op. cit., 263-269.
(27) Merttens v. Hill [1901] 1 Ch. 842; Iveagh v. Martin [1961] 1 Q.B. 232.

(a) Free Tenure

The free tenures comprised frankalmoin tenure, tenure by knight service, serjeanty and free and common socage.

(i) Frankalmoin

Frankalmoin, free alms, came to be characterized by the strictly religious nature of the service and the absence of any secular duty. The tenant had to be an ecclesiastical person or body, and further no definite or specific service capable of being enforced by the secular courts was reserved upon the grant. Nor was fealty due to the lord. Rather a general obligation, to say prayers and masses, was implied. It was indeed the omission of a definite service that distinguished frankalmoin from the other kind of spiritual tenure, namely tenure by divine service.

Upon alienation, even to another ecclesiastical body, frankalmoin tenure was converted into socage tenure.[28] Tenure in frankalmoin could exist only between the grantor or his heirs and the grantee: it has been described as a "stationary and a gradually decaying" tenure.[29]

(ii) Knight Service

Knight service was the method by which almost all tenants-in-chief held their land and was the most honourable form of landholding. Immediately after the Conquest this was the method by which the army was constituted, the service being to provide a stipulated number of armed horsemen for, it seems, forty days each year. The inefficiency of this system soon became apparent and military necessity demanded a more flexible form of recruitment. About a century after the Conquest it became the practice of the Crown to commute this service to a money payment, scutage. Within a relatively short time thereafter scutage ceased to be demanded and, save for the incidents attached to this service, its abolition would have had little impact upon feudal society. Gradually this tenure was converted into a "form of land-holding and nothing more".[30]

(iii) Serjeanty

By the time of Littleton it became established that this kind of tenure could exist only between the King and his tenants in chief. The services were of an essentially personal nature, closely connected with the person, or the special service, of the King. They covered the spectrum ranging from services of an honourable and dignified nature to those menial in character. In the course of time a division was created between grand serjeanty and petit serjeanty. Grand serjeanty comprised those services of an honourable and dignified kind and required service by the tenant's own person, and was equated to knight service. Hence knight service and grand serjeanty were collectively known as tenure in chivalry. Petit serjeanty comprised services military in connotation, but which were not to be performed by the tenant in person, for example, supplying for the King's use some small article of war; it was said to be "but socage in effect"[31] and was generally treated as a form of socage tenure.

(28) Challis, op. cit., 11.
(29) Holdsworth, op. cit., 37.
(30) Holdsworth, op. cit., 45.
(31) Litt., 160. See holdsworth, op. cit., 51.

(iv) Socage

Free or common socage was "one of the ancient modes of tenure".[32] By the time of Littleton diverse services which did not comprise military or spiritual tenure or tenure by serjeanty, had been grouped together and termed tenure in socage. The great range of possible services required this negative description. The "grand criterion and distinguishing mark"[33] of socage tenure was that the services reserved were ascertained, for otherwise the tenure would be unfree; they were also of an agricultural nature. In the course of time they were commuted to a money payment. In various locations special customs attached to land held by socage tenure.[34] Two of the most important were gavelkind and tenure in burgage; borough English was the "principal and most remarkable"[35] variety of burgage tenure. Common socage described socage tenure absent these special customs.

In early days socage tenure did not command the aura of dignity that was connected with holding by military tenure. However, it was considerably less onerous in its incidents and "fitted in best with the newer ideas which regarded land-holding simply as a form of property".[36] Free and common socage tenure became the great residuary, and ultimately the sole surviving, tenure.

(b) Unfree Tenure[37]

Initially it was important to distinguish between free and unfree tenure for, after some hesitation, the rule became clear that only a tenant who held by free tenure could seek redress in the common law courts.[38] The villein was denied this protection and, so far as the common law was concerned, held only at the will of the lord.[39] As stated by Paull J. in Iveagh v. Martin:[40]

> The legal conception of villeinage has its roots not in the connection of the villein with the soil but in his personal dependence on the lord (Vinogradoff, Villeinage in England (1892), p. 44). The villein was subject to the law of the lord of the manor, his court being presided over by the lord or the lord's steward, who dispensed justice according to the custom of the manor, whereas the freemen had the right to have the King's law, that is, the common law, applied.

It was the character of the services which determined the tenure by which land was held. If the services reserved were "certain", the tenure was free; if "uncertain", the tenure was unfree, or villeinage: this was the test usually applied by the courts.[41] The concepts of "certain" and "uncertain" require elaboration. In Attorney-General for Alberta v. Huggard Assets Ltd., the Privy Council, while assuming, without deciding, that a variable royalty would be inconsistent with the requirements of free and common socage tenure, said:[42]

> One instance given by Littleton (Coke on Littleton, 96A) of a tenure on "certain" services is where the te-

(32) The Attorney-General of Ontario v. Mercer (1883), 8 App. Cas. 767, at p.772.
(33) Bl. Comm., op. cit., 81.
(34) Generally, Holdsworth, op. cit., 256 et seq.
(35) Bl. Comm., op. cit., 83.
(36) Holdsworth, op. cit., 53.
(37) Generally, Pollock and Maitland, op. cit., 356-383; Holdsworth, op. cit., 198-213; Williams, op. cit., 491-539; Simpson, op. cit., 145-162.
(38) Holdsworth, op. cit., 206-209; Simpson, op. cit., 152-155.
(39) Pollock and Maitland, op. cit., 360.
(40) [1961] 1 Q.B. 232, 261.
(41) Pollock and Maitland, op. cit., 371; Simpson, op. cit., 149-150.
(42) [1953] A.C. 420, 443. Also see The Attorney General v. Brown (1847), 2 S.C.R., Appendix 30 (N.S.W.).

> nure depends on the tenant shearing all sheep on the grantor's land, a service which can clearly be made more or less burdensome according as the grantor chooses to have upon his land few or many sheep. Littleton himself describes this as a "certainty in uncertainty".

A service may be "minutely defined"[43] in many respects by manorial custom and yet the nature of this work might be "uncertain", for until directed by the lord the tenant might not have known the particular task he had to perform. Gradually, and for a variety of reasons, the services to be rendered by unfree tenants came to be commuted to a money payment, a process hastened by the Black Death, which "completely disorganised"[44] the manorial system. This commutation produced a change in the economic relations that existed within the manor and was "doubtless one of the chief causes"[45] of the transition from unfree tenure to copyhold tenure. Although the common law regarded an unfree tenant as holding his land at the will of the lord, the lord's will was, in general, controlled by manorial custom recognized and enforced by the manorial court. Dealings with such land were recorded on the rolls of this court and evidence of the title of the copyhold tenant rested upon a copy of the roll of the manorial court. Hence the use of the language, tenure by copy of the court roll or, more shortly, copyhold tenure. By the fifteenth century a copyholder could protect his possession, according to the custom of the manor, in the Court of Chancery. In the sixteenth century, this he could do both against a stranger and against his lord by an action of ejectment in the common law courts. Accordingly copyhold land came to be included in the definition of real property.

Land held by copyhold tenure persisted in England until 1925 when all such land was enfranchised, that is converted into land held by socage tenure, by the Law of Property Act, 1922.[46] Certain specified incidents were abolished forthwith, others were phased out and some preserved indefinitely.[47]

3. INCIDENTS OF TENURE

The purpose of early land law was not to simplify the conveyancing of land or to achieve the desires of the tenant in desmesne. Its purpose was simple: to protect and to further the interests of the feudal lord. In this way there developed the so-called incidents of tenure: the "fruits and consequencies" which were "inseparably incident" to the relationship of lord and tenant.[48]

As has been mentioned, the services reserved on a grant of land came to be commuted to a fixed money payment; for example, scutage where land was held by knight service. These payments declined in value as the purchasing power of money decreased. This process of diminishing returns could have produced the obsolescence of the law of tenures. This result

(43) Pollock and Maitland, op. cit., 371. The passage reads: "The tenure is unfree, not because the tenant 'holds at the will of the lord,' in the sense of being removable at a moment's notice, but because his services, though in many respects minutely defined by custom, can not be altogether defined without frequent reference to the lord's will."
(44) Plucknett, op. cit., 32.
(45) Williams, op. cit., 498.
(46) 12 & 13 Geo. 5, c. 16.
(47) Megarry and Wade, op. cit., 34-38.
(48) Bl. Comm., op. cit., 63.

did not, however, follow. Indeed there occurred in the fifteenth and sixteenth centuries a resurgence of interest in feudalism, a resurgence attributable to those rights conferred upon a feudal lord which were in addition to, but which were very much dependent upon, the tenurial system. Moreover, unlike the feudal services, these incidents of tenure were related to the land itself and accordingly became of more worth as land values increased. The original character of the feudal incidents may have been to protect the legitimate interests of the lord. They were however distorted from their initial context and came to be regarded as "considerable, if irregular, source of revenue".[49] These incidents, and their main features, may be summarized as follows.

(a) Homage and Fealty

Homage comprised a solemn ceremony whereby the tenant became the lord's man. Homage represented the public element in feudal law.[50] It was "almost confined"[51] to tenure in chivalry. Both the lord and the tenant gained from this ceremony for, in the field of private law, the doing of homage by a tenant gave rise to an obligation by the lord to warrant the tenant's holding.[52] Homage ancestral occurred where a tenant and his ancestors had held land from the same lord and his ancestors "time out of memory".[53] Fealty was the "mutual bond of obligation"[54] between lord and tenant. Fealty arose from the oath of faithful service sworn by the tenant in favour of his lord; it was "the obligation of fidelity which the tenant owed to his lord".[55]

(b) Aids

The aid has been described as "one of the most widely distributed of the feudal phenomena".[56] Originally "mere benevolences granted by the tenant to his lord",[57] aids became sums of money which the lord was entitled to demand of his tenants in special cases limited by Magna Carta[58] to three: when the lord was imprisoned and required a ransom, upon the marriage of his eldest daughter and upon the knighting of his eldest son. Both tenure by knight service and socage tenure were subject to aids, although one who held by grand serjeanty was not liable for the latter two aids, that is aide pur faire fitz chevalier and aide pur file marier. Aids were designed to assist a lord in circumstances of financial difficulty and in their origin may have been symbolic of "the 'stand or fall together' relationship of lord and man".[59] By 1504 the practice of levying aids had fallen into disuse. In that year, however, Henry VII approached the House of Commons for aids towards, inter alia, the knighting of his eldest son who had been knighted fifteen years before and who had died two years previously. His motive was not only the collection of money, but also the desire to obtain an up-to-date register of his tenants in chief.[60]

(49) Hurstfield, The Queen's Wards, (1958), 4.
(50) Holdsworth, op. cit., 57.
(51) Challis, op. cit., 13.
(52) Pollock and Maitland, op. cit., 306; Simpson, op. cit., 15.
(53) Challis, op. cit., 13.
(54) Bl. Comm., op. cit., 86.
(55) De Peyster v. Michael, 57 Am. Dec. 470, 479 (1852).
(56) Pollock and Maitland, op. cit., 351.
(57) Bl. Comm., op. cit., 63.
(58) 1215, c. 12. The rates due in the last two circumstances were fixed by statute: see Holdsworth, op. cit., 67.
(59) Simpson, op. cit., 16.
(60) This latter reason did not succeed for, although the House of Commons made a grant to the King, this was done in "recompense and satisfaction" of the feudal aid which they refused. See Hurstfield, op. cit., 8.

(c) Relief

Who was entitled to possession of land upon the death of a feudal tenant? The relationship of lord and tenant was essentially personal. The estate granted was, at first, regarded as having "lapsed or fallen in by the death of the last tenant".[61] The eldest son of the tenant might have been well suited to perform the services reserved upon the land, but the lord was under no obligation to accept him in his father's place. Perhaps to assist the lord in deciding that he was worthy of acceptance the eldest son, in furtherance of his moral claim, would pay a sum of money to the lord for the privilege of retaining his father's rights. This sum so paid by an heir, of full age, to his lord in order that he might succeed to the property of his ancestor, was termed relief.[62] It was eventually fixed at 100s. for a knight's fee and at one year's rent in the case of socage tenure.

From the resolution of the conflicting, but not necessarily adverse, interests of lord and tenant developed the "recognition of hereditary right in return for the payment of the relief".[63] For, particularly if the service was of a military character, the lord would prefer a male to a female and the elder to the younger. Possibly in this way the law of primogeniture developed. So too the limitation to the tenant "and his heirs" may perhaps be traced as a prior commitment on the part of the lord to so accept the tenant's heir upon the death of the tenant. Relief became, however, a right due to the lord and continued to be so regarded even when the law of inheritance had become settled and the right of the heir to succeed upon the death of a tenant established:[64]

> But, though reliefs had their original while feuds were only life-estates, yet they continued after feuds became hereditary; and were therefore looked upon, very justly, as one of the greatest grievances of tenure: ...

Relief was regarded as a kind of estate tax and the doctrine of worthier title[65] and the Rule in Shelley's Case[66] may have been the result of judicial disinclination to assist a tenant in its evasion.

Payment of relief entitled the heir of a tenant who held of a mesne lord to immediate possession. If, however, the lord was the King, that is upon the death of a tenant in chief, the additional prerogative right of primer seisin (first seisin) accrued. This involved the holding of an inquest to determine who was the next heir. Only thereafter, and only after the doing of homage and payment of relief, was the heir of a tenant in chief admitted to possession.[67] The King was provided with additional relief which, if the lands were held in possession, amounted, in general, to one year's profit thereof.[68]

Relief was an incident of "every feudal tenure".[69] It was applicable to land held by both military and socage tenure and, by the fifteenth century, to tenants by serjeanty.

(61) Bl. Comm., op. cit., 65.
(62) Holdsworth, op. cit., 57.
(63) Holdsworth, op. cit., 58.
(64) Bl. Comm., op. cit., 65.
(65) Moynihan, op. cit., 149-162.
(66) (1581), 1 Co. Rep. 88b.
(67) Pollock and Maitland, op. cit., 311-312.
(68) Bl. Comm., op. cit., 66-67; Simpson, op. cit., 17.
(69) Bl. Comm., op. cit., 65.

(d) Wardship and Marriage

In early days it was not infrequent that a tenant might die and leave an infant heir. The result which followed was more dramatic and oppressive than that which occurred when the heir was of full age; that is the incident of relief. Perhaps because the right to inherit was weaker, the land, it was said, went into wardship. With the land also went the child. The lord was under no obligation to account for any profit he might make from the land: guardianship was looked upon as a "profitable right".[70] His only obligation was to support, educate and protect the child. In days of disorder this could perhaps be said to have been a fair exchange. Perhaps also this arrangement could at one time have been justified: the heir while an infant was unable to render military service and it was appropriate, therefore, to allow the lord to retake possession of land until he came of age so as to obtain such service from other sources: further the lord had an interest in the child performing the services satisfactorily when he attained full age. However, long after events had precluded any such rationalization the lord continued to be entitled to wardship when his tenant died leaving a male heir under twenty-one years or a female heir under fourteen years. If the heir was a male the wardship continued until he attained twenty-one years, if female until she attained sixteen years or married under that age.

What if the infant heir was a female? Should not the lord have some control over her marriage? Possibly her intended husband might be unable to perform the feudal services, or, worse still, be a persona ingratia to the lord.[71] For these reasons the lord would appear to have had a legitimate claim to consent to the marriage of a female ward. However, he early became entitled to a right to choose a prospective spouse, provided the choice involved no disparagement or inequality. If the ward refused a marriage the lord became entitled to the value of the marriage, and if the ward married without the lord's consent, he or she forfeited double the value of the marriage. Moreover this right was extended to apply to male as well as female wards.

Wardship and marriage became valuable property rights. They could be sold and were so "thoroughly proprietary and pecuniary"[72] that they could be disposed of by will and would pass to the guardian's executors or administrators. They developed into a land tax which was "distorted, anachronistic, irregular and inefficient, but a land tax faute de mieux"[73] and fell within the category of chattels real. Wardship and marriage attached only to land held by knight service and grand serjeanty. Tenure by socage and petit serjeanty were subject to guardianship, but of a quite different kind from that here discussed.[74]

(e) Escheat

Escheat, one of the "fruits of a seignory",[75] was an incident of both

(70) Pollock and Maitland, op. cit., 323.
(71) Holdsworth, op. cit., 61.
(72) Pollock and Maitland, op. cit., 322.
(73) Hurstfield, op. cit., 5.
(74) Holdsworth, op. cit., 65–66.
(75) Kavanaugh v. Cohoes Power & Light Corporation, 187 N.Y.S. 216, 231, (1921).

tenure by knight service and socage tenure.[76] It occurred in two circumstances.

The death of a tenant without heirs effected a "dissolution of the mutual bond"[77] between the lord and the tenant. The tenure that had existed between them determined and the lord's "superiority swells into simple ownership".[78] There no longer being any tenant, it was "only right"[79] that the lord should have back again that which he gave the tenant and, thus, the land returned, or fell back, to the lord. This kind of escheat was, without attainder, called escheat propter defectum sanguinis. There was also escheat by attainder, known as escheat propter delictum tenentis. It occurred when the tenant was convicted of felony, and was based upon the "curious and biologically absurd"[80] notion that the tenant's blood had been corrupted in such a way as to lose its inheritable quality, with the result that there was a constructive failure of heirs.[81] Initially felony comprised conduct which caused a serious breach of the feudal bond between lord and tenant created by the ceremony of homage. As Lord Denning stated:[82]

> When a lord allotted a feud or fee to a tenant there was a condition annexed to it that the tenant should do service faithfully to him by whom the lands were given: for which purpose the tenant took an oath of fealty; and in case of breach of this condition and oath the lands reverted to the lord who granted them. If the tenant did anything tending to impair the title of his lord to the lands it was a breach of his oath of fealty and gave rise to a forfeiture.

Escheat was always to the feudal lord, either the Crown or a mesne lord, as the case may be.[83] Therefore when felony bore its early meaning it may not have been irrational for land to return to the lord. However, within two centuries after the Conquest the concept of felony became much broader and included many kinds of criminal offences. Nevertheless the rule persisted. Perhaps to signify the public interest, escheat of this kind was subject to the Crown's right, of obscure origin, to hold the land for a year and a day and to commit waste.[84] Further, should the tenant commit high treason, his lands were forfeit to the Crown. This occurred, however, by virtue of the royal prerogative and, unlike escheat, in no way related to tenure. Forfeiture was always to the Crown even though the lands were held of a mesne lord.

4. SEISIN: THE CONNECTING FACTOR

To say that feudal obligations fell upon the feudal tenant is a truism. But who, for this purpose, was the feudal tenant? What factor sufficiently related a person to land so as to justify this consequence? The answer given by the common law was the concept of seisin. Seisin formed an integral part of the feudal fabric. It was the great connecting factor. Thus a real action could be brought only against the person seised of the land. Further, and material for present purposes, feudal

(76) Land held in gavelkind was not subject to escheat for felony: see Bl. Comm., op. cit., 89.
(77) Bl. Comm., op. cit., 72. See also Re Henday (1916), 16 S.R. (N.S.W.) 442.
(78) Pollock and Maitland, op. cit., 351.
(79) Holdsworth, op. cit., 67. See generally, In re Stone; Read v. Lubun (1936), 36 S.R. (N.S.W.) 508, 517.
(80) Simpson, op. cit., 19.
(81) Challis, op. cit., 34.
(82) Warner v. Sampson [1959] 1 Q.B. 297, 312.
(83) The Attorney-General of Ontario v. Mercer (1883), 8 App. Cas. 767, 772.
(84) Holdsworth, op. cit., 69. For a discussion of the history of escheat and forfeiture, see Le Thorp and The Real Property Act 1900 [1962] N.S.W.R. 889.

services and incidents could be enforced only against the person so seised. In early law this was "equivalent to saying that, during abeyance of the immediate freehold, all rights, both public and private, in reference to the land, were in abeyance also".[85] From reasoning of this kind was fashioned a fundamental rule governing the creation of legal estates, namely, that there could never be an abeyance of seisin.

5. ALIENABILITY

Restrictions upon alienation must be considered in the context of dispositions inter vivos and testamentary dispositions.

(a) Inter vivos

Potential restrictions upon the right of a feudal tenant to alienate his land by an inter vivos disposition could arise from two sources. One, the relationship between the tenant and his heir, presumptive or apparent; and the other, his relationship with his lord.

(i) Tenant and heir

At common law the form of a grant of a fee simple estate was to "A and his heirs". One possible origin of this expression has been mentioned. Involved was the question whether the heir apparent or heir presumptive of the grantee acquired any interest in the land while the grantee still lived. Could the grantee dispose of the land free from any claim by such heir? Quite early, in D'Arundels Case,[86] it was held that he could, and it has long been established that the words "and his heirs" are words of limitation and confer no interest at all upon the grantee's heir apparent or heir presumptive as such.

(ii) Tenant and lord

Alienation could be either by way of substitution or subinfeudation.

A grant by substitution would occur when B, who held land of A, granted this land to C in such a way that B completely dropped out of the feudal picture, being replaced by C: no new tenure was thereby created between B and C. C would hold of A and would be substituted for B in the feudal structure. This method of dealing could work against the feudal lord. For the relationship of lord and tenant was initially intensely personal: it was created by the ceremony of homage whereby the tenant swore fealty to his lord. As has been stated:[87]

> The lord had an interest in having a brave and loyal tenant, capable of rendering military service; and, on the other hand, the tenant was interested in living under the military chief of his own choice and adoption. ... The grantee, owing fealty to his lord and grantor, could not alienate his land without the licence or consent of his lord, who was the owner of the reversionary interest contingent upon the death of the grantee without heirs.

(85) Challis, op. cit., 100. See too Plucknett, op. cit., 583-584.

(86) (1225), Brac. N.B. 1054. Generally, Challis, op. cit., 166; Holdsworth, op. cit., 73-76; Williams, op. cit., 67-75.

(87) Title Guarantee & Trust Co. v. Garrett, 183 P. 470 (1919), at p. 472 per Finlayson, P.J. At p. 471 it is stated that prior to the statute Quia Emptores, ".....restraints upon alienation of lands held in fee simple were practically an inseparable part of the ancient feudal system."

Further, at least until 1217,[88] B might have alienated to C part only of the land, with the result that both B and C became involved in the performance of the services due to A. The position of a tenant as to alienation has been put in this way:[89]

> In the early vigor of the feudal system, a tenant in fee could not alienate the feud without the consent of his immediate superior; but this extreme rigor was soon afterwards relaxed, and it was also avoided by the practice of subinfeudation, ...

When such relaxation did occur, doubt existed as to the extent to which restraint could be imposed by a lord upon his tenant's power of alienation.[90]

If alienation by way of substitution could impinge upon the interests of the lord, so too could a dealing by way of subinfeudation, which practice was "considered detrimental to the great lords, as it deprived them to a certain extent of the fruits of the tenure, such as escheats, marriages, wardships, and the like, ..."[91] For tenurial incidents were related not to the land, but to the seignory. Thus assume that A granted land to B by way of subinfeudation and that B, in turn, subinfeudated the land to C in return for nominal services. Should, for example, escheat occur, that which would revert to A would be B's seignory, that is the right to receive the nominal services from C, and not possession of the land itself.[92] Also, B could simply disappear, depriving A of any knowledge of occasions giving rise to a beneficial incident.

Such uncertainty as existed was swept away in 1290 by the statute Quia Emptores, which has been re-enacted in Ontario, and which, inter alia, provides:[93]

> Forasmuch as purchasers of lands and tenements of the fees of great men and other lords, have many times heretofore entered into their fees, to the prejudice of the lords to whom the freeholders of such great men have sold their lands and tenements to be holden in fee of their feoffors, and not of the chief lords of the fees, whereby the same chief lords have many times lost their escheats, marriages, and wardships of lands and tenements belonging to their fees; which thing seemed very hard and extreme unto those lords and other great men, and moreover in this case manifest disheritance: ... granted, provided, and ordained, That from henceforth it shall be lawful to every freeman to sell at his own pleasure his lands and tenements, or part of them, so that the feoffee shall hold the same lands or tenements of the chief lord of the same fee, by such service and customs as his feoffor held before.

This statute applied only to lands held in fee simple; it "most assuredly"[94] had nothing to do with personal estate. The Act effected a compromise solution. The custom of subinfeudation, which had "become intolerable",[95]

(88) 1217, 1 Hen. III (Magna Carta), c. 39: "No free man shall henceforth give or sell so much of his land as that out of the residue he may not sufficiently do to the lord of the fee the service which pertains to that fee." See, Pollock and Maitland, op. cit., 332; cf. Simpson, op. cit., 51. See also In re Holliday [1922] 2 Ch. 698, 707.

(89) Van Rensselaer v. Hoyt, 75 Am. Dec. 278, 280 (1859).

(90) Pollock and Maitland, op. cit., 329-349.

(91) Van Rensselaer v. Hays, 75 Am. Dec. 278, 281 (1859).

(92) Pollock and Maitland, op. cit., 330-331; Plucknett, op. cit., 539; Moynihan, op. cit., 23.

(93) 1290, 18 Edw. 1, c. 1; R.S.O., 1897, c. 330; see Appendix A of the R.S.O., 1970. See generally In re Holliday [1922] 2 Ch. 698. See also In re Stone; Read v. Dubua (1936), 36 S.R. (N.S.W.) 503; discussed (1936), 10 Austr. L.J. 315.

(94) In re Chardon [1928] Ch. 464, at p. 469 per Romer J.

(95) Kavanaugh v. Cohoes Power & Light Corporation, 187 N.Y.S. 216, 231 (1921). See also Harnelle v. Carroll (1896), 27 O.R. 240, 248.

was forbidden: the creation of new tenures prevented. The value of the lord's feudal incidents were accordingly preserved. But scant attention was paid to what at one time was the personal relationship of lord and tenant; for a tenant was empowered to alienate his land by substitution at his "own pleasure". Parliament thereby, "by one stroke of the pen, broke down the last remnant of the feudal restrictions upon alienation that formerly had prevented the tenant from selling his land without the licence of his grantor and feudal lord".[96] On alienation of part only of the land provision was made for the apportionment of services. The statute did not, however, bind the Crown. Thus tenants in chief, who could no longer subinfeudate,[97] could alienate by substitution only with the consent of the Crown which, until legislation in 1660,[98] came to involve the payment of a fine.[99] Moreover the Crown could continue to grant land and to create new tenures. Enshrined in Quia Emptores is the principle of free alienability of land, a principle perhaps always discernable in the common law. The result of this statute has been that no new tenures have been created since 1290 except upon a grant from the Crown. As has been stated:[100]

> Every subsequent alienation placed the feoffee in the same feudal relation which his feoffee before occupied; that is, he held of the same superior lord by the same services, and not of his feoffer. The system of tenures then existing was left untouched, but the progress of expansion under the practice of subinfeudation was arrested.

The existence today of a mesne lord requires proof, therefore, that this relationship existed prior to 1290.

(b) Testamentary

At an early stage in the common law, it appears that realty could be devised by will. By the end of the thirteenth century, however, the law was settled, and apart from local customs in particular localities, devises of realty were no longer possible. Quite why this common law attitude was adopted has been said to be a "difficult question".[101] Holdsworth states:[102]

> Probably the decision to prohibit them was caused chiefly by the fact that to permit them would lower the value of the incidents of tenure, and enormously diminish the lord's chance of an escheat.

This restriction upon testamentary dispositions was circumvented by means of a disposition to uses. The Statute of Uses, 1535[103] was, it seems, intended to, and was believed to, prevent this indirect mode of making a will of land.[104] An outcry followed, culminating in the Pilgrimage of Grace, 1536.[105] By the Statute of Wills, 1540,[106] tenants in fee simple were empowered to devise all lands held in socage tenure and two-thirds of their lands held in knight service.[107] With the abolition of military tenure in 1660 all land became freely devisable.

(96) Title Guarantee & Trust Co. v. Garrott, 183 P. 470, (1919), at p. 472 per Finlayson P.J.
(97) In re Holliday [1922] 2 Ch. 698.
(98) Tenures Abolition Act, 1660, 12 Car. 2, c. 24.
(99) Challis, op. cit., 19-20.
(100) Van Rensselaer v. Hays, 75 Am. Dec. 278, 281, (1859).
(101) Simpson, op. cit., 131.
(102) Op. cit., 75.
(103) 27 Hen. 8, c. 10.
(104) Megarry and Wade, op. cit., 167.
(105) Simpson, op. cit., 179; Moynihan, op. cit., 195.
(106) 32 Hen. 8, c. 1. See In the Estate of Lila Rainbow (1934), 29 Tas. L.R. 131.
(107) Challis, op. cit., 227-229.

6. DECAY OF THE TENURIAL SYSTEM

After 1290 mesne lordships became increasingly uncommon. Successive alienations gradually weakened the tie between lord and tenant, and the relation itself generally "became obliterated".[108] More and more land came to be held directly of the Crown. Services, many commuted into money payments, became of decreasing importance as the value of money declined. Society became orientated to a wage-earning economy and progressively less feudal in content. Accordingly the notion of landholding in return for services fell steadily into decay. But not so the incidents of tenure. These incidents, particularly wardship and marriage, no longer fulfilled their original purpose but became instead articles of trade and provided a profitable source of revenue. The Crown alone was always lord and never tenant. It needed "only a parsimonious despot, and a few tortuous-minded and industrious lawyers, to resurrect some of the boldest claims of the crown and to seize the opportunity to which some of his predecessors had pointed the way".[109] This resurgence of interest in feudalism did occur. The incidents of wardship and marriage were revived and became an increasing financial burden to the landholder. The result was the development of techniques aimed at their evasion, techniques which have had a lasting impact upon the principles of property law. As a counter-move the Crown secured the enactment of the Statute of Uses, 1535,[110] which was designed to restore to the Crown the feudal revenues which were being so evaded. This measure succeeded, but when the Crown's financial interest in feudal incidents diminished the way was clear for remedial legislation. Military tenures, with "all their heavy appendages, were destroyed at one blow"[111] by the Tenures Abolition Act, 1660.[112] Secs. 1 and 2 abolished knight service tenure and its characteristic burdens in respect of estates then existing and converted them into tenure by free and common socage, free from these burdens in the future. Sec. 4 related to estates to be created after the statute, and sec. 7 contained certain saving provisions:

> IV. And be it further enacted by the authority aforesaid, That all tenures hereafter to be created by the King's majesty, his heirs or successors upon any gifts or grants of any manors, lands, tenements or hereditaments, of any estate of inheritance at the common law, shall be in free and common socage, and shall be adjudged to be in free and common socage only, and not by knights-service or *in capite*, and shall be discharged of all wardship, value and forfeiture of marriage, livery, primer seisin, ousterlemain, *aide pur fair fitz chivalier* and *pur file marrier*; any law, statute or reservation to the contrary thereof in any wise notwithstanding.
>
> VII. Provided also, and be it further enacted, That this act, or any thing therein contained, shall not take away or be construed to take away, tenures in *Frank Almoign*, or to subject them to any greater or other services than they now are; (2) nor to alter or change any tenure by copy or court roll, or any services incident thereunto; (3) nor to take away the honorary services of grand-serjeantry, other than of wardship, marriage and value of forfeiture of marriage, escuage, voyages royal and other charges incident to tenure by knights-service; and other than *aide pur fair fitz chivalier*, and *aide pur file marrier*.

(108) *Kavanaugh v. Cohoes Power & Light Corporation*, 187 N.Y.S., 216, 232, (1921).
(109) Hurstfield, *op. cit.*, 7.
(110) 27 Hen. 8, c. 10.
(111) Bl. Comm., *op. cit.*, 77.
(112) 12 Car. 2, c. 24. See Challis, *op. cit.*, 23-24. See also *In re Holliday* [1922] 2 Ch. 698.

The only tenures that continued to exist, therefore, were free and common socage, copyhold and frankalmoin; the former being the "ordinary tenure"[113] on which, since this Act, lands were held in England. As has been stated when discussing this Act:[114]

> Its main objects were two: to abolish certain oppressive incidents of feudal military tenure, "wardships", "marriages", "primer seisin", "ousterlemain", and the like. To effect this it was necessary to abolish the military or knight service tenures themselves - the soil from which those incidents sprang. Their sacrifice must involve the King in financial loss, for which he was to be compensated under the terms of the Act (clauses 15 to 27) by certain duties on strong liquors, for instance, beer, cider, perry and aqua vitae; some home produced, some imported.

The honorary incidents of grand serjeanty, but not the tenure, were preserved. Onerous incidents, including wardship, marriage, relief and aids, were abolished: but other incidents, including escheat (and forfeiture), though not expressly mentioned, were not taken away.[115] As compensation for the loss of revenue, the Crown was granted an hereditary tax on beer, an early example of the implementation of the loss distribution theory.

Reform continued in England and culminated with legislation in 1925.[116] Frankalmoin tenure had by then become obsolete. The main features of this legislation, in the present context, were the enfranchisement of copyhold land, that is its conversion to land of freehold tenure, and the abolition of escheat propter defectum sanguinis; forfeiture, and escheat propter delictum tenentis, had already been abolished.

(113) The Trusts and Guarantee Co. v. The King (1916), 54 S.C.R. 107, at p. 125 per Anglin J. See also The Attorney General v. Brown (1847), 2 S.C.R., Appendix 30 (N.S.W.).

(114) Attorney-General for Alberta v. Huggard Assets Ltd. [1953] A.C. 420, at pp. 441-442 per Lord Asquith of Bishopstone.

(115) The Attorney-General of Ontario v. Mercer (1883), 8 App. Cas. 767, 772.

(116) Megarry and Wade, op. cit., 34-39.

Section 2 LAND LAW AND TENURE IN ONTARIO

PROBLEM

In 1978, John died intestate. The assets of his estate included an automobile, valued at $2,500, corporate shares valued at $5,000, and the fee simple estate in Blackacre, valued at $50,000. John left unsecured debts of $5,000, and a $20,000 mortgage on Blackacre. He left him surviving no persons who could claim as intestate successors under the Succession Law Reform Act, 1977. The file in your office contains a memorandum, written in 1977, which includes the following:

> "There is no real difference between the passing of the personalty and the passing of the realty. Pursuant to the provisions of the Escheats Act, both types of property become the property of the Crown. The personalty passes to the Crown as bona vacantia, and the realty so passes by escheat. However, the Public Trustee can, under section 2 of the Crown Administration of Estates Act, R.S.O. 1970, c. 99, be granted administration, '...for the use and benefit of Her Majesty or of such persons as ultimately appear to be entitled thereto.' It is my considered opinion that in passing to Her Majesty, the assets of this estate do not pass unencumbered by its debts. These debts are to be settled by the Public Trustee. As Lindall, Surr. Ct. J., stated in Re Androws, '... the claims of creditors should rest on legal rights and not on executive grace.' Re Hole is not the law of Ontario. The cases cited in Re Androws lead me to the view that the debts are to be settled."

Comment.

NOTE The present position as to land law and tenure in Ontario may be summarized in this way.

(a) Land is vested in the Crown

There is no doubt that "all ungranted lands in the province of Ontario belong to the crown as part of the public domain ..."[1] This follows, in part, from secs. 108, 109 and 117 of the British North America Act, 1867,[2] which provide:

> 108. The public works and property of each Province enumerated in the third Schedule to this Act, shall be the property of Canada.[3]
>
> 109. All lands, mines, minerals, and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals or royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than of the Province in the same.
>
> 117. The several Provinces shall retain all their respective public property not otherwise disposed of in this Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country.

These sections have been subject to detailed comment elsewhere.[4] For present purposes it suffices to shortly state that sec. 109 has been held to give to each Province the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown, with the exception of such lands as the Dominion acquired right to under sec. 108, or might assume for the purposes specified in sec. 117.[5] Sec. 109, it should be noted,

1. The St. Catherines Milling and Lumber Company v. The Queen (1887), 13 S.C.R. 577, at p. 599 per Ritchie C.J.; appeal dismissed (1888), 14 A.C. 46. Also see Doe d. Burk v. Cormier (1890), 30 N.B.R. 142; R. v. Guthrie (1877), 41 U.C.Q.B. 148, 154.
2. 30-31 Vic., c. 3, as amended.
3. Third Schedule - Provincial Public Works and Property to be the Property of Canada
   1. Canals, with Lands and Water Power connected therewith.
   2. Public Harbours.
   3. Lighthouses and Piers, and Sable Island.
   4. Steamboats, Dredges, and Public Vessels.
   5. Rivers and Lake Improvements.
   6. Railways and Railway Stocks, Mortgages, and other Debts due by Railway Companies.
   7. Military Roads.
   8. Custom Houses, Post Offices, and all other Public Buildings, except such as the Government of Canada appropriate for the use of the Provincial Legislatures and Governments.
   9. Property transferred by the Imperial Government, and known as Ordnance Property.
   10. Armouries, Drill Sheds, Military Clothing, and Munitions of War, and Lands set apart for general public purposes.
4. La Forest, Natural Resources and Public Property under the Canadian Constitution, (1969).
5. St. Catherine's Milling and Lumber Company v. The Queen (1888), 14 A.C. 46, 57-58.

did not so vest lands in the Crown; but rather operated upon the premise that this was the state of affairs at the time of the union. The manner in which this occurred may be briefly mentioned.[6]

The capture of Quebec in 1759, and the capitulation of Montreal in 1760, were followed by the Treaty of Paris, 1763. By the fourth article of this Treaty, the King of France ceded, in "the most ample manner",[7] Canada, with all its dependencies, to the Crown of Great Britain. The area involved extended from Hudson's Bay to the Gulf of Mexico and included French Canada. At the time of this cession ownership of all ungranted lands was vested in the French King,[8] and the consequence of the cession, in this regard, has been stated as follows:[9]

> Now when by the treaty of 1763, France ceded to Great Britain all her rights of sovereignty, property and possession over Canada, ..., it is unquestionable that the full title to the territory ceded became vested in the new sovereign, and that he thereafter owned it in allodium as part of the crown domain, in as full and ample a manner as the King of France had previously owned it.

By royal proclamation issued shortly after the Treaty of Paris, four distinct and separate governments styled Quebec, East Florida, West Florida and Grenada were erected and specified boundaries assigned to each, the boundary of Quebec being corrected by the Quebec Act, 1774.[10] In 1791 the old Province of Quebec was divided into Upper and Lower Canada.[11] In 1840 these Provinces were reunited as one Province under the name of the Province of Canada.[12] Finally, the Province of Canada was divided into the Province of Ontario and the Province of Quebec by sec. 6 of the British North America Act, 1867.

In so far as any part of Ontario may not have formed part of the territory ceded by the Treaty of Paris,[13] it would nevertheless seem that title would, as a matter of common law, be in the Crown. In The Attorney General v. Brown the Supreme Court of New South Wales put the matter this way:[14]

6. Generally see Le Forest, op. cit., 6-14; Anger and Monsberger, Canadian Law of Real Property, (1959), 1-13.
7. Kennedy, Documents of the Canadian Constitution 1759-1915, (1918), 15.
8. The St. Catharines Milling and Lumber Company v. The Queen (1887), 13 S.C.R. 577, at p. 644 per Taschereau J.; appeal dismissed (1888), 14 A.C. 46.
9. The St. Catharines Milling and Lumber Company v. The Queen (1887), 13 S.C.R. 577, at p. 645 per Taschereau J.; appeal dismissed (1888), 14 A.C. 46. See too, at first instance, (1885), 10 O.R. 196, at p. 204 per Boyd C.: "The legal and constitutional effect of the conquest of Quebec and the cession of Canada was to vest the soil and ownership of the public land in the Crown, and to subject the same to the Royal prerogative."
10. 1774, 14 Geo. 3, c. 83.
11. 1791, 31 Geo. 3, c. 31.
12. 1840, 3 & 4 Vic., c. 35.
13. See, for example, the Acts respecting the boundaries of Ontario in Appendix B to volume 6 of the R.S.O., 1970: the Canada (Ontario Boundary) Act, 1889, 52-53 Vic., c. 28 (Imperial), 1889, 52 Vic. (2), c. 2 (Ont.); The Ontario Boundaries Extension Act, 1912, 2 Geo. 5, c. 40 (Canada), 1912, 2 Geo. 5, c. 3 (Ont.); The Ontario and Manitoba Boundary Line Act, 1929, 19 Geo. 5, c. 3 (Ont.); 1950, 14 Geo. 6, c. 16 (Canada); The Ontario-Manitoba Boundary Act, 1950, 14 Geo. 6, c. 48 (Ont.); the Ontario-Manitoba Boundary Act, 1953, 2-3 Eliz. 2, c. 9 (Canada); The Ontario-Manitoba Boundary Line Act, 1953, 2 Eliz. 2, c. 76 (Ont.); The Ontario-Manitoba Boundary Line Amendment Act, 1955, 4 Eliz. 2, c. 56 (Ont.).
14. (1847), 2 S.C.R., Appendix 30 (N.S.W.), at pp. 34-35, 39, per Stephen C.J., delivering the judgment of the Court. Also see Re Sonner (Deceased) [1963] St. R. Qd. 488.

> The territory of New South Wales, and eventually the whole of the vast island of which it forms a part, have been taken possession of by British subjects, in the name of their Sovereign. They belong, therefore, to the British Crown . ... It was maintained, that this supposed property in the Crown was a fiction. Doubtless, in one sense it is so. The right of the people of England to their property, does not in fact depend on any royal grant; and the principle, that all lands are holden mediately or immediately of the Crown, flows from the adoption of the feudal system merely. That principle, however, is universal in the law of England; and we can see no reason why it shall be said not to be equally in operation here. The Sovereign, by that law, is (as it is termed) universal occupant. All property is supposed to have been, originally, in him. Though this be generally a fiction, it is one "adopted by the constitution, to answer the ends of government, for the good of the people". But, in a newly discovered country, settled by British subjects, the occupancy of the Crown, with respect to the waste lands of that country, is no fiction. If, in one sense, those lands be the patrimony of the nation, the Sovereign is the representative, and the executive authority of the nation; the 'moral personality' (as Vattel calls him, Law of Nations, book 1, chap. 4,) by whom the nation acts, and in whom for such purposes its power resides. Here is a property, depending for its support on no feudal notions or principle. ...
>
> First, the title to lands in this colony is in the Crown, equally on constitutional principles, as by the adoption of the feudal fiction.

Presumably analogous reasoning would, if necessary, be held applicable to Ontario.

(b) Free and Common Socage, the only Freehold Tenure

It is clear that the tenurial system of landholding was introduced into Upper Canada. This was accepted by sec. 43 of the Imperial Constitution Act, 1791,[15] which provided, inter alia, that thereafter all lands within Upper Canada should be granted in free and common socage:

> 43. ... all lands which shall be hereafter granted within the said provice of Upper Canada shall be granted in free and common soccage, in like manner as lands are now holden in free and common soccage, in that part of Great Britain called England; and that in every case where lands shall be hereafter granted within the said province of Lower Canada, and where the grantee thereof shall desire the same to be granted in free and common soccage, the same shall be so granted; but subject nevertheless to such alterations, with respect to the nature and consequences of such tenure of free and common soccage, as may be established by any law or laws which may be made by his Majesty, his heirs or successors, by and with the advice and consent of the legislative council and assembly of the province.

Further sec. 1 of the Property and Civil Rights Act, 1970,[16] reproducing a provision enacted in 1792 at the first meeting of the Legislative Assembly of the newly-formed Province of Ontario,[17] provides, inter alia:

15. 1791, 31 Geo. 3, c. 31. See The Attorney-General of Ontario v. Mercer (1883), 8 App. Cas. 767. See also Laskin, op. cit., 26-27.
16. R.S.O., 1970, c. 367.
17. 1792, 32 Geo. 3, c. 1, sec. 3.

> 1. In all matters of controversy relative to property and civil rights, resort shall be had to the laws of England as they stood on the 15th day of October, 1792, as the rule for the decision of the same, ... except so far as such laws and rules have been since repealed, altered, varied, modified or affected by any Act of the Imperial Parliament, still having the force of law in Ontario, or by any Act of the late Province of Upper Canada, or of the Province of Canada, or of the Province of Ontario, still having the force of law in Ontario.

In Miller v. Tipling,[18] Riddell J. pointed out that in Ontario "we are governed in real estate matters by the law of England - except as it may have been modified by statute - the law of England having been introduced" by this said provision of 1792. Accordingly the alienation of a freehold estate by way of subinfeudation has never, it would appear, been possible in Ontario, for as at the 15th October, 1792, the statute Quia Emptores formed part of English law. So too did the Tenures Abolition Act, 1660,[19] which was likewise, it would seem,[20] made applicable to Ontario; though the terms of sec. 43 of the Imperial Act of 1791 render this point devoid of any real significance.

Presumably to render their application beyond doubt, or possibly to ensure that our "statutory record would be as complete as possible",[21] the statute Quia Emptores and the Statute of Uses, 1535,[22] have been specifically reenacted in Ontario.[23]

18. (1918), 43 O.L.R. 88, 96. See also The Keewatin Power Company v. The Town of Kenora (1908), 16 O.L.R. 184. See too Scharfe v. Hughes (1908), 16 O.R. 570, 576. C.f. Re Bonner (Deceased) [1963] St. R. Qd. 488.
19. 12 Car. 2, c. 24.
20. The Keewatin Power Company v. The Town of Kenora (1908), 16 O.L.R. 184, 189-190. But see Attorney-General for Alberta v. Huggard Assets Ltd. [1953] A.C. 420, 441-442.
21. Kavanaugh v. Cohoes Power & Light Corporation, 187 N.Y.S. 216, 232, (1921).
22. 27 Hen. 8, c. 10.
23. See R.S.O., 1970, vol. 6, appendix A, pp. 9-13. The statute De Donis Conditionalibus was likewise re-enacted, but was prospectively repealed by the Real Property Amendment Act, S.O., 1956, c. 76. It is, however, retained in force to control estates tail existing as at 27th May, 1956: see the Conveyancing and Law of Property Amendment Act, S.O., 1956, c. 10.

> **7.**—(1) Where possession of any real estate or an interest therein has been taken by the Public Trustee under this Act, the Lieutenant Governor in Council may direct the sale of such real estate at such price and upon such terms as is determined, and the Public Trustee is thereupon authorized to sell, in accordance with the directions of the order in council, the whole or a part of such real estate or an interest therein and to convey it to the purchaser.
>
> (2) Where possession of any personal estate has been taken by the Public Trustee under this Act, he may sell it at such price and upon such terms as to him seem proper.

NOTE: The Escheats Act was first enacted in 1877 by 40 Vict. c. 3 as an Act to Amend the Law Respecting Escheats and Forfeitures. It remained unchanged in the 1877, 1887 and 1897 statutory revisions (c.c. 94, 95, and 114 respectively). In 1909 it was re-enacted by 9 Edw. VII c. 57 as the Escheats and Forfeiture Act, which appeared subject to some amendments in R.S.O. 1914 c. 104. It was repealed and re-enacted in its present form by The Escheats Act, S.O. 1942, c. 14. The current statute is in substantially the same terms as the original enactment.

The law of escheat prior to the 1877 Act is discussed in A.G. Ontario v. O'Reilly (1878), 26 Gr. 126. On appeal to the Privy Council, this case is reported as A.G. Ontario v. Mercer (1883), 8 App. Cas. 767 and in it the Privy Council held that escheats of property in Ontario were to the Crown in right of the Province of Ontario rather than to the Crown in right of the Dominion of Canada. Escheat occasioned by the commission of a felony was abolished in Canada in 1892 (see the Criminal Code of Canada S.C. 1892, 55-56 Vict. c. 29, s. 965).

> **965.** From and after the passing of this Act no confession verdict, inquest, conviction or judgment of or for any treason or indictable offence or *felo de se* shall cause any attainder or corruption of blood, or any forfeiture or escheat; Provided that nothing in this section shall affect any fine or penalty imposed on any person by virtue of his sentence, or any forfeiture in relation to which special provision is made by any Act of the Parliament of Canada. 33-34 V. (U.K.) c. 23, ss. 1, 6 and 5.

This provision was not carried over into the Criminal Code, S.C. 1953-54, c. 51. It is suggested that s. 5(1)(b) of the present Code would now control. It should, however, be noted that there may be a question whether federal legislation concerning escheat propter delictum tenetis (see p. 1.1.10-1.1.11) is constitutionally valid.

Section 4 of the current Escheats Act authorizes the Lieutenant Governor in Council to grant any property which has become the property of the Crown as mentioned in section 2 of the Act, to any person having inter alia a "moral claim" upon the person to whom it had belonged. A moral claim may be one based upon some special relationship of the deceased and the claimant. For example, those who care for a deceased child without having adopted him may, on that child's death, have a moral claim within the meaning of the section."

Problem:

Dick died in 1978. His will contained, inter alia, the following dispositions:

his car to X

his painting to Y

his bonds to Z

...

Dick owned the fee simple estate in Blueacre. He did not dispose of this property by his will and he did not leave any person who could claim to be entitled as interstate successor under the Succession Law Reform Act, 1977.

Who is now entitled to Blueacre?

Explain the method by which this entitlement is obtained.

e.g. X may own a fee simple estate in Blackacre. Y may hold a leasehold estate of 99 years. The land may be subject to a rent charge in favour of A of $500 per year. B may have a right to take gravel from a pit on Blackacre (a profit a prendre). C, a neighbour, may have a right to go from his house across Blackacre in order to reach the main road (an easement). X and Y may be unable to use Blackacre for business purposes because the land is subject to a restrictive covenant imposed by D.

The study of land law, however, presents no difficulties if the basic concepts are understood.

NOTE:

Occasionally, the words "real property" may be defined by statute: See Canaport Ltd. v. Minister of Municipal Affairs of New Brunswick et al. (1975), 64 D.L.R. (3d) 1 (S.C.C.)

and Kennebecasis Valley Recreational Centre Inc. v. Minister of Municipal Affairs of New Brunswick (1975), 61 D.L.R. (3d) 364 (N.B.S.C., App. Div.).

Section 2 SEISIN AND POSSESSION

BIGELOW, Introduction to the Law of Real Property
3d ed., (1945), c. 2 and 5

The distinction that the law makes between freehold and nonfreehold estates, which has already been referred to, is of importance in another regard, namely, in the distinction between seisin and possession. The word "seisin" is a very old one in the English law. In the first one or two centuries after the Conquest, it was used merely to indicate possession, either of land or of chattels. Thus the old writers speak indifferently of a man being seised of land or of a horse. Gradually, however, the term "seisin" began to take on a more technical meaning, and to be distinguished from the word "possession." [22]

In discussing the origin of the nonfreehold estates it has been pointed out that the estate for years was in the beginning regarded as giving the lessee for years only a contract right against his lessor, that his occupation of the land was more in the nature of a chattel interest therein than of a holding within the feudal organization. Consequently for the purposes of determining feudal relations and obligations the freehold lessor of the tenant for years was the only one looked to by the overlord. Gradually the term "seisin" was applied only to denote the possession of a tenant holding a freehold estate, and the occupancy of a tenant holding a nonfreehold estate was designated as possession, and this difference in the terms is now definitely established. Consequently, if A, owning in fee simple, leases to B for years, B has the possession, but A still retains the seisin, even though, of course, the de facto occupant of the land is B.

The next step in the development of the doctrine of seisin may be illustrated by the following case: Suppose A, the owner in fee, grants to B for life. B, now having a freehold estate, has the seisin. B, however, owes A the feudal obligations of homage, fealty, and the like. Consequently the feudal lawyers said that A also was seised in respect of these rights. They distinguished between the two by saying that B was seised in his demesne and that A was seised in his services. This idea of a seisin that was not in fact accompanied by an actual possession was applied in another type of case. Thus, if A had a right to rent from B's land, and A's estate in the rent was a freehold (i. e., in fee or for life), A was said to be seised of the rent to which he is thus entitled; and if A was deprived of the rent by the tortious act of B or of a third person, A was said to be disseised of the rent, and he could bring an action to recover the rent that was almost identical with the action that he would bring to recover the seisin of land from which he had been tortiously ousted. It is not necessary to follow further these interesting questions of the somewhat refined doctrines of seisin. Our concern at present is only with the seisin of the demesne; that is, with the actual possession of the land under a freehold title. In connection with the idea of seisin in this most elementary sense one other aspect of the doctrine, of extreme importance in the law of conveyances of interests in land and of the creation of future estates in land which are next to be considered, requires to be specifically stated. The purpose of the feudal organization of society and the whole theory upon which it was constructed were that all land should always be in the possession of some tenant having a freehold interest therein—that is, a seisin—who should be responsible for the performance of the feudal obligations. From this principle follows the doctrine that the seisin of land can never be in abeyance, or, to state the same thing in a different form, that some one must always be seised of any given piece of land. There were a few minor exceptions to this rule, but they are of so slight importance as not to require further mention.[23]

The importance of the seisin of the land, the freehold possession of it, in the earlier law, has already been referred to. This doctrine of seisin remains to be considered from still another point of view, viz., as to the effect produced upon the rights of persons having an interest in land by a wrongful ouster or disseisin [1] therefrom.

Suppose that A is seised of land in fee simple, and that B wrongfully enters upon him and puts him out. The effect of this act by B, technically called a disseisin, is to divest A of the seisin of the land and to vest a tortious seisin in B. Or, again, suppose that A has a reversion in fee, subject to a life estate in B, and B wrongfully enfeoffs X in fee. This also operates as a disseisin of A. The same result follows if the tenant for life should enfeoff X in tail. This would give X a tortious seisin in tail, with a tortious reversion in fee in B, the tenant for life. The effect of a disseisin, if committed against a tenant in fee, was necessarily to deprive him of all his interest in the land and to vest a tortious seisin in the disseisor, which might be divided into smaller tortious estates in the manner above indicated. A's interest was no longer an estate; after the disseisin, all he possessed was a right of entry or a right of action. These rights were peculiarly personal to himself. They could descend to his heir, but they could not be alienated.

A's remedies after a disseisin of the sort above indicated were three:

He had, first, the right of self-help. If within a short time after his disseisin (under the older law, apparently five days) he made a re-entry upon the disseisor, he might thereby successfully re-establish himself in the seisin of the land. At a later date this period was probably somewhat lengthened, but it was always brief, and by the Statute 3 Rich. II, ch. 8, it was provided that no entry should be made, even by the disseisee, if it involved a breach of the peace. If the circumstances were such that A could not safely make this re-entry upon the land, he could keep alive his right of entry by making once a year as near the land as possible a definite assertion of his right thereto and a demand for the repossession thereof. This was known as keeping alive the right of entry by continual claim. Even under these circumstances, however, the right of entry was lost if the disseisor died in the wrongful seisin of the land, so that the wrongful seisin thereof descended to his heirs. In this case the right of entry was said to be tolled by descent cast.

If the disseisee, for one reason or another, lost his right of entry, he was then driven to bring his action. Actions for the assertion of rights in land were of two sorts: droitural and possessory. The purpose of the droitural action, as the name indicates, was to determine, as between the plaintiff and the defendant, who had the right to the land. The droitural actions, however, were very slow, very expensive, and gave a great advantage to the defendant, because of the mere fact that he was in the possession of the land with respect to which the action was being brought. Consequently in the reign of Henry II (1154–1189) the so-called possessory actions first made their appearance. The purpose of these actions was to determine, not the question of the ultimate right to the land, but who was entitled to the immediate possession thereof. That is to say, in the hypothetical case under discussion, if A had lost his right of entry, his next step would be to bring a possessory action based upon the fact that he had been in possession of the land. In this action neither A nor B would be allowed to raise the question of the ultimate ownership of the land; the only question that would be decided would be whether A had been in the seisin of the land and B had put him out without any judgment justifying B in so doing. If so, A would have judgment for a restoration to possession and for damages. After A had been thus revested with the seisin of the land, B might, as plaintiff, litigate the question of who was really

entitled to the land. The purpose and limited scope of this possessory action made it necessary that it should be brought within a short time after the disseisin complained of. The form of possessory action first devised was the novel disseisin; later other forms were invented to meet varying situations.

If the plaintiff, A, delayed too long in the bringing of his possessory action, so that this method of procedure was no longer open to him, or if he was defeated in his possessory action through some technical reason, he would still be able to bring his droitural action. He would no longer be able to rely upon his right to immediate possession, but despite the fact that the defendant would have the benefit of the actual seisin of the land, the plaintiff would still have it open to him to show that he nevertheless had a better right to the land than did the defendant, and if he ultimately succeeded in obtaining a judgment in the droitural action, he would then be restored to the land from which he had been disseised.

By the beginning of the 17th century both the writs of entry and writs of right had become practically obsolete, and the action of ejectment, of which mention has been made in the discussion of leasehold estates, had become the almost universal method of settling the right to both possession and title of land. The use of fictions by which this action was enlarged from its original narrow purpose is characteristic of the method by which the common-law judges accomplished desirable results by the adoption of means that were originally intended for no such purpose.

Section 3 SEISIN AND CONVEYANCING

BIGELOW, Introduction to the Law of Real Property c. 2 3d ed., (1945)

The most natural and obvious way of transferring rights in any tangible object is by delivering that object to the person to whom it is desired to transfer the rights in it. Indeed, if the rights are conceived of as inhering in the object, this would seem to be almost the only way by which the rights could be transferred. One of the oldest and the most commonly used methods of conveying estates in land was based upon this conception. To be sure, the land could not be physically picked up like a book and handed to the grantee. But the nearest approximation to that would be equally satisfactory, namely, to put the grantee physically into the possession of the land, under such circumstances as would make it manifest that the intent was thereby to transfer to him a freehold interest in the land. This was in fact, as has already been said, the most common way of transferring seisin of land under the early English law. It was technically called livery of seisin, or feoffment. It was done by A, the feoffor, taking B, the feoffee, to the land in question and there handing him a branch or a piece of turf as a symbolical delivery of the land. No deed was required; the physical act of delivery was the operative act to transfer the title. The act of giving or receiving livery could be performed by an agent. As a matter of security this always took place in the presence of witnesses, and, if the transaction was of any importance, a formal document was ordinarily drawn up, stating the fact of the livery, and what land was given, and for what estates. This document was called the charter of feoffment. From the nature of livery of seisin it follows that it was a present act—that is, the seisin could be passed out of the feoffor only by an act of present delivery; an attempt to make a livery of seisin to take effect at some future date was a nullity. This doctrine appears to have been qualified somewhat by the so-called livery in law. Under this latter doctrine the feoffor could take the feoffee to the neighborhood of the land, point it out to him, and declare to him that he thereby gave him livery. This was effectual if the feoffee entered into the land during the life of the feoffor.

The method adopted for the transfer or creation of nonfreehold interests was analogous to livery of seisin. Of course, since the tenant for years had only a possession, and not seisin, the transaction was not technically a livery of seisin. But the same fundamental idea of a physical installation on the land prevailed. It was a less ceremonious affair, partly, doubtless, for the reason that the estate created was of not so long a duration. There was one important difference between the creation of a freehold estate and a nonfreehold estate. Since the nonfreehold estate was in its origin a contract rather than a property right, the doctrine that the estate could not be created to begin in future had no application. Consequently, A could make a lease to B of Blackacre to begin at a specified future date. On that date it was merely necessary for B to enter into possession. He was not regarded as having a leasehold interest in the interval, but he was regarded as having a right to the lease, and this right was technically called an interesse termini.

If A, the owner in fee, wished to convey his land to B in fee, subject to a contemporaneous three-year lease in favor of C, this required a combination of livery of seisin and possession; the seisin clearly could not be delivered directly to B, for that would mean putting him into the land to the exclusion of C's leasehold interest. On the other hand, C could not take a livery of seisin to himself, since he had a nonfreehold interest. The creation of these estates was accomplished by putting C into the possession of the land and delivering seisin to him for B, who was thus considered as having been vested with the seisin subject to C's three-year possessory interest.

These methods of creating freehold and nonfreehold estates continued in England unchanged by statute until the latter part of the 17th century. In the Statute of Frauds it was provided, among other things that "all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to or out of any messuages, manors, lands, tenements or hereditaments made or created by livery and seisin

only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the effect of leases or estates at will only, and shall not, either in law or equity be deemed or taken to have any other or greater force or effect; ° ° ° except nevertheless all leases not exceeding the term of three years from the making thereof." ° ° °[1]

The law as thus outlined continued substantially unchanged until the 19th century, at which time, after various pieces of legislation, it was finally provided in 1845 (8 & 9 Vict. c. 106, § 2) that after October 1, 1845, all corporeal tenements and hereditaments should, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery.

See Thorne, Livery of Seisin, (1936) 52 Law Q. Rev. 345, pointing out that the "stress laid upon livery of seisin as the essential element of the conveyancing has been due to an incomplete distinction between seisin in the sense of possession and seisin in the sense of ownership."

At common law, non-possessory freehold interests (for example, a seigniory, a reversion or a remainder) were transferable by deed of grant. In the case of a seigniory, attornment was necessary to perfect the transfer; and it was equally necessary in the conveyance of land held under a lease. The requirement of attornment was abolished by 4 and 5 Anne, c. 16, s. 9 (now replaced by s. 151 of the Law of Property Act, 1925 (Imp.), c. 20). For similar legislation, see Landlord and Tenant Act, R.S.O. 1970, c. 236, ss. 61 and 62.

CONVEYANCING AND LAW OF PROPERTY ACT
R.S.O. 1970, c. 85, as amended

Conveyance of corporeal tenements

2. All corporeal tenements and hereditaments, as regards the conveyance of the immediate freehold thereof, lie in grant as well as in livery.

Form and operation of feoffments

3. A feoffment, otherwise than by deed, is void and no feoffment shall have any tortious operation.

LAW OF PROPERTY ACT, 1925
(U.K.), c. 20

52. Conveyances to be by deed.—(1) All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed.

(2) This section does not apply to—

(*a*) assents by a personal representative;

(*b*) disclaimers made in accordance with section fifty-four of the Bankruptcy Act, 1914, or not required to be evidenced in writing;

(*c*) surrenders by operation of law, including surrenders which may, by law, be effected without writing;

(*d*) leases or tenancies or other assurances not required by law to be made in writing;

(*e*) receipts not required by law to be under seal;

(*f*) vesting orders of the court or other competent authority;

(*g*) conveyances taking effect by operation of law. [730]

CHAPTER III

SUBJECT MATTER OF ESTATE OWNERSHIP

PROBLEM

John was a kayak enthusiast. John held the fee simple estate in Blackacre. He based his kayaking activities on Blackacre. The Polar River runs through Blackacre and empties into the Bearing Sea, which borders on the southern extremity of Blackacre. Jim held the fee simple estate in Greenacre, upstream on the River Polar from Blackacre and adjoining the northern boundary of Blackacre. Jim didn't think much of kayaks, but did feel that gliding in a sailplane provided fine recreation. He often soared 5,000 feet into the air, passing over Blackacre in so doing. On rare days when winds were from a northerly direction, Jim had to skim the tops of the trees on Blackacre to effect safe landings on Greenacre. John disapproved of Jim's activities, and asked him to cease these activities. Jim, in turn, objects to these trees on John's land. Jim alleges that they interfere with his gliding activities and has requested John to remove them. Jim, further, had no use for kayaking. Accordingly, when Jim decided to create a reservoir on Greenacre to experiment with amphibious sailplanes, he felt no qualms about diverting almost all of the flow of the River Polar for this purpose, leaving only a non-navigable trickle of water running through Blackacre to the Bearing Sea. Needless to say, John strongly protested this use of the Polar River. John has also learned that Jim is planning a 'Soar-In', at which, he has heard, all the amphibious sailplane enthusiasts in the area will congregate on the newly constructed reservoir. John fears that this activity will pollute what is left of the flow of the River Polar, and wishes to prevent the 'Soar-In'. John had other problems to consider. The Bearing Sea had been evaporating rapidly during the past few years. From the time that John purchased the fee simple in Blackacre, the high and low tide marks have retreated a considerable distance from the shore. A group of scuba enthusiasts have set up camp on that part of the newly uncovered land that lies to the south of the old low tide line, and have refused to move on John's request. The Crown Patent of Blackacre sets out the southern boundary of the grant as: "... and then along the shore of the Bearing Sea to ...". Meanwhile, Jim had become fascinated by speleology. He had discovered a cave entrance on Greenacre. This cave passes below Blackacre, and ends there in a spectacular cavern. Jim has widened the entrance on Greenacre, which is the only known entrance. This entrance is close to the northern border of Blackacre. John had built a kayak hut on Blackacre, near to this border, and this removal of soil by Jim has caused the walls of John's hut to develop cracks. John wants to stop all activity concerning the cave. Blueacre lies to the west of Blackacre. Paul owned the fee simple therein. John purchased from Paul a fee simple estate in the surface land of Blueacre, with Paul retaining the sub-surface fee simple in order that he might mine for gold. John constructed a small building on Blueacre, in which he planned to maintain and repair his kayak equipment. He now finds that Paul's mining activities below the surface are causing this building to sink.

Discuss.

NOTE: In the 5th Session of the 29th Ontario Legislature, a private members bill, Bill 63, was introduced. This amendment, had it been enacted, would have had the effect of reversing the principle laid down in Re Walker and A.G. Ontario (ante). The relevant sections of the Bill are reproduced below. The Bill did not proceed beyond 1st Reading.

BILL 63, 1975

1.—(1) *The Beds of Navigable Waters Act*, being chapter 41 of the Revised Statutes of Ontario, 1970, is amended by renumbering section 1 as section 1*a* and by adding thereto the following section:

1. In this Act,

(*a*) "bed" used in relation to a navigable body of water shall include all land and land under water lying below the high water mark; and

(*b*) "high water mark" shall mean the level at which the water in a navigable body of water has been held for a period sufficient to leave a watermark along the bank of such navigable body of water.

(2) Section 1*a* of the said Act, as renumbered by subsection 1, is amended by adding thereto the following subsections:

(2) Where in any patent, conveyance or deed from the Crown made either heretofore or hereafter, the boundary of any land is described as a navigable body of water or the edge, bank, beach, shore, shoreline or high water mark thereof or in any other manner with relation thereto, such boundary shall be deemed always to have been the high water mark of such navigable body of water.

(3) The Minister of Natural Resources may, upon the recommendation of the Surveyor-General for Ontario, fix the high water mark of any navigable body of water or any part thereof, and his decision shall be final and conclusive.

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SECTION 6 Rights of Riparian Owner

A landowner whose land adjoins a river, stream or lake thereby enjoys certain rights, known as riparian rights. These rights do not rest upon express grant: they are natural rights, in that they accrue as a natural incident of the ownership of riparian land. Land is riparian land provided it ordinarily comes into contact with a body of water for a substantial part of each day.

It is not the purpose of this material to state in any detail the law relating to riparian rights. But, for discussion purposes, the following general propositions may be asserted.

The most fundamental of riparian rights is that of access to the water. Since it is a property right, interference with it by anyone entitles the landowner to bring an action or to obtain an injunction, without proof of damage.

A riparian owner whose land adjoins a natural stream has the right to drain his land into the stream, even when this affects the flow down-stream, though the precise extent of this right cannot be stated with certainty. But a riparian owner is liable in damages if he pollutes the water, and he may be enjoined from doing so by injunction.

A riparian owner also enjoys certain rights regarding the flow of water, the manner in which water reaches and leaves his land. He is entitled to have water flow down to his land as it has been accustomed to flow, substantially undiminished in quantity and quality. Nevertheless other riparian owners have the right to use this water, provided such use is reasonable as to extent and nature and the public may enjoy rights of navigation and floating. The riparian owner is entitled as well to have the water leave his land unobstructed. Riparian rights regarding the flow of water may be summarized in this way: the right to have the water flow in its natural course; the right to prevent water from being permanently extracted from the stream - water, if abstracted, must, in general, be returned to the stream substantially undiminished in quantity and quality; the right to have the water flow at its natural rate and at its natural times - though an upper riparian owner may make reasonable use of water flowing through his land; and the right to have the water leave the owner's land unobstructed - a down-stream owner is not entitled to build a dam which obstructs the flow of water from the upper owner's land.

A riparian owner may make use of water in a running stream as it passes his property. In this context, it is necessary to distinguish between the right of ordinary use and the right of extraordinary use. The right of ordinary use seems to be restrictively interpreted. It must be a use that is closely related to the riparian land. Such a right includes the right to use water for drinking purposes. Where use is an ordinary use, an upper riparian owner appears to be under no liability to a lower riparian owner even if the supply of water is thereby completely exhausted. Extraordinary use is a use that is not an ordinary use but that is, nevertheless, a use that is connected with the riparian land. Extraordinary use would commonly include the use of water for the purpose of irrigation. In the case of extraordinary use, water must be returned to the stream without sensible diminuation in quantity and quality.

Generally, see: La Forest, Water Law in Canada: The Atlantic Provinces, (1973), Ch. 9.

certain officers of the Sudbury Rotary Club, including those that the evidence discloses took an active part in the negotiations. No formal application has been made under the provisions of Rule 75 but I deem it appropriate in all the circumstances to authorize the named officers to defend on behalf of or for the benefit of all the members of the said club. In this connection, I rely on the comments of Middleton, J., in *Barrett v. Harris* (1921), 51 O.L.R. 484, 69 D.L.R. 503.

An order will therefore go restraining the defendants, Nick Naneff, Bruce Mooney, Norman Greene, John Mousseau, Bruce Moore, Laverne Anderson, as officers and representatives of the Sudbury Rotary Club and in their own behalf, their servants or agents or anyone else acting on their behalf, from continuing to hold or organize speed-boat races on Lake Ramsay within the City of Sudbury on Saturday and Sunday, September 12 and 13, 1970, or any other time thereafter. And a further order will go restraining the defendants, the Parks and Recreation Commission of the City of Sudbury and the Municipal Corporation of the City of Sudbury from granting permission to or allowing the defendants, Naneff, Mooney, Greene, Mousseau, Moore and Anderson, on their own behalf or on behalf of the Sudbury Rotary Club, to use Bell Park within the City of Sudbury for the purpose of a speed-boat regatta on Lake Ramsay on Saturday and Sunday, September 12 and 13, 1970, and at any time thereafter. These orders shall remain in force until 12:00 o'clock noon on September 17, 1970. I should like to hear from counsel on the question of costs.

Order accordingly.

NOTE: Section 118(1) of the Judicature Act, R.S.O. 1970, c. 228, empowers every judge of a county court to sit as a local judge of the High Court, "... subject to the rules, power and authority to do and perform all such acts and transact all such business in respect of matters and causes in or before the High Court as he is by statute or the rules empowered ...". Rule of Practice 213 (1) permits a local judge to grant an ex parte injunction if the situation is such that the delay required for an application to a judge of the High Court is likely to involve a failure of justice, and limits the duration of such an injunction to a maximum of eight days.

In Epstein v. Reymes, (1973), 29 D.L.R. (3d) 1 (S.C.C.), the plaintiff sought an injunction and damages against the defendant, his neighbour, based on the alleged nuisance constituted by the noise of commercial hunting and trap shooting on the defendant's land. The defendant in turn sought an injunction prohibiting the plaintiff from interfering with the flow of water to his land. At a point upon a stream flowing across the plaintiff's land was a wooden box or tile, which diverted the flow so that part of the stream flowed under some cedar roots and onto the defendant's land, emptying into a pond there. The plaintiff had blocked this flow in the course of the dispute with the defendant over the commercial hunting and trap shooting. The trial Judge found that the wooden box or tile had been so placed since at least 1923, and concluded that the defendant had established an easement under s. 31 of the Limitations Act, R.S.O. 1960, c. 214 (now, R.S.O. 1970, c. 246, s. 31).

The Supreme Court granted the plaintiff a permanent injunction against the nuisance constituted by the noise of the commercial hunting and trap shooting. The Court also held that the defendant had established the right to a prescriptive easement and accordingly awarded the defendant a permanent injunction concerning the stream. In delivering the judgment of the Supreme Court of Canada, Laskin, J., however, noted:

> I would have been content, in the circumstances of the present case, to place the respondent's position not on prescriptive easement but on the proposition stated in 28 Hals., 1st ed. (1914), p. 424, para. 838, as follows:
>
> 838. Every riparian owner on a natural watercourse flowing in a known and defined channel, whether on the surface of the land or below it, or in an artificial channel of a permanent character, has as incident to his property in the riparian land a proprietary right to have the water flow to him in its natural state in flow, quantity, and quality, neither increased nor diminished, whether he has yet made use of it or not.
>
> This proposition was carried into 33 Hals., 2nd ed. (1939), p. 593, but was dropped in the current 40 Hals., 3rd ed. (1962), p. 516. It does, however, reflect a view of the law taken in American cases. The weight of authority there is that riparian rights exist in the flow of artificial streams where the artificial condition has permanency and lower riparian owners have relied upon its continuance: see 93 Corpus Juris Secundum, s. 129, pp. 841-2; 6A American Law of Property (1954), p. 157. • • • • •

NOTE: For a good discussion of the common law rights of a riparian owner, see Lockwood v. Brentwood Park Investments Ltd. (1970), 10 D.L.R. (3d) 143 (N.S.C.A.); and George v. Van Gestel (1973), 45 D.L.R. (3d) 212 (N.S.S.C., App. Div.). See also Rapoff v. Velios, [1975] W.A.R. 27 (S.C. Western Australia].

NOTE: In the 2nd Session of the 31st Ontario Legislature, a private member's bill, Bill 94, was introduced. The explanatory note of this bill provided as follows:

EXPLANATORY NOTE

The purpose of the Bill is to prohibit mining activity in bodies of water that serve or are likely to serve as sources of community drinking water. The Bill provides for the issuance of permits to authorize mining activity that is in the public interest. Mining activity undertaken without the authority of a licence is constituted as an offence.

This bill did not proceed beyond first reading

See also: The Pesticides Act S.O. 1973, c. 25.

See also, Pugliese et al. v. National Capital Commission et al. (1977), 79 D.L.R. (3d) 592 (Ont. C.A.).

SECTION 7 Surface Waters

The doctrine of riparian rights applies to water lying in a lake or pond or to water flowing in a river, stream or other watercourse; but this doctrine does not apply to surface water. If a flow of water is permanent, thus of perennial benefit to the land through which it flows, it would seem to be a natural watercourse. Surface water is the natural drainage of water across the surface of land in flows that are too small or too impermanent to make the doctrine of riparian rights applicable. Surface water includes rain water and snow-melt draining from higher lands to lower lands.

It is not the purpose of this material to state in any detail the law relating to surface waters. But, for discussion purposes, the following general propositions may be asserted.

Higher land may drain onto lower land naturally and the lower landowner has no cause of action if injury should result from the flow. But lower land owes no servitude to receive natural drainage: that is, no right of drainage exists jure nature; and, at common law, a landowner may, it seems, prevent surface water from passing across his property by creating artificial obstructions, even though this might flood higher land in the line of flow or interfere with a program of accumulation undertaken by another owner farther downstream: though, where surface water is confined in a natural channel or a natural depression, it may be noted that the cases are not entirely consistent on this point. Subject to this uncertainty, the generalization may be made that a watercourse is a riparian stream and cannot be obstructed: but the flow of surface water may be so obstructed.

Surface water may not be diverted artificially across neighbouring land; that is across land not otherwise in the line of flow. But this rule is apparently modified where the dive rsion results from a landowner's protecting his land against damage from a flow of surface water. A landholder is apparently not required to submit to the flow of surface water across his land, and his right to block the flow may, it seems, not be affected by the fact that water is diverted onto adjoining land: that is, provided any obstruction so erected, is erected as a barrier: (that is, with the intention of protecting the reasonable use of his land) and not as a medium for conducting water from his premises and casting it upon adjoining land (that is, not for the mere purpose of diverting surface water onto adjoining land.) So too, it seems that, in general, a landowner is under no liability where surface water is diverted not by the erection of an artificial obstruction, but rather, where this occurs as a natural consequence o f the reasonable use and development of land. It should, however, be noted that, on the broad topic of diversion of surface waters, the cases are not altogether consistent. Nor can the application or scope of the so called "common enemy" rule be dogmatically asserted.

A landowner may appropriate surface water within the boundaries of his land, without, it seems, incurring liability to holders of land through which the water had previously flowed or through which the water would subsequently have flowed. While there is no property interest in surface water, as such, it appears that, at common law, a landowner has a right to appropriate surface water found on his land. And, in this context, a doctrine of reasonable use do es not seem applicable.

Generally see: La Forest, Water Law in Canada: The Atlantic Provinces (1973), Ch. 18.

If there is either a water channel or a strip of land or a ridge or other barrier between the upland and the newly created land, no accretion can be considered. It is not joined to that land so it cannot become part of it. It may be doubted whether a process of accretion can ever take place for land bordering on a large inert lake body. Accretion does happen for rivers as in the *Edmonton* case where there is a definite buildup against a bank. No doubt if the water level of the lake gradually falls, as I understand is happening in some of the Great Lakes not because of silting-up operation, but because of the loss of the volume of water in the lake as a whole, then the gradual process could be one of true accretion. It would be a horizontal progression outwards from the shore. But that is not what happened in the present case.

My answer therefore to the first question is that no true act of accretion took place here and that rather than following the pattern of development in the *Clarke v. Edmonton* case, the land rose here in exactly the same manner as was found by the Supreme Court of Canada in *A.-G. B.C. v. Neilson.*

In the event that I am wrong in my answer to question number one, I will proceed to answer the second question as if a true accretion had taken place.

. . . . . .

Having decided question number one against the petitioner however, I must hold his petition is hereby dismissed.

Petition dismissed.

Note: In Re Brew Island, [1977] 3 W.W.R. 80, (B.C.S.C.) an action was brought to determine the ownership of certain accreted land. The petitioner owned Brew Island and the respondent owned McMillan Island, which lay partially to its north. The channel that had originally separated the two islands had been filled in by alluvial deposit and land had formed that joined the two islands. In determining the ownership of this accreted land, Meredith J. divided the land in such a way as to give both parties a share in the new shoreline, so they could both have access to the river. In the course of his judgment, Meredith J. commented on the decision in Re Bulman (1966), 57 D.L.R. (2d) 658 (B.C.S.C.):

. . .

The petitioner has cited *Re Bulman's Petition* (1966), 56 W.W.R. 225, 57 D.L.R. (2d) 658 (B.C.), a decision of Ruttan J. The land there in question was situated at the junction of the North Thompson River and Kamloops Lake. The petitioner owned lakeshore. The lake silted up in front of the petitioner's property. The court held, as in *A.G. B.C. v. Neilson*, [1956] S.C.R. 819, 5 D.L.R. (2d) 449, that the added land was not true accretion as being simply an elevation of the lake bed. However, the petitioner relies upon this passage from the judgment of Ruttan J. at p. 231:

"If there is either a water channel or a strip of land or a ridge or other barrier between the upland and the newly created land, no accretion can be considered. It is not joined to that land, so it cannot become part of it."

The headnote in the *Bulman* case reads in part [W.W.R.]:

"It was *held* that the act of accretion, when it is done by alluvial deposit, contemplates the adding to existing land by the process of building up against that land. Accretion can occur by the recession of water gradually and imperceptibly from the land or by the addition of alluvial deposit to the dry land or foreshore. In either case the act of accretion means an adding to, a fixing on to existing dry land. If there is either a water channel or a strip of land or a ridge or other barrier between the upland and the newly created land no accretion can be considered. *Clarke v. Edmonton*, [1930] S.C.R. 137 at 144, [1929] 4 D.L.R. 1010, reversing [1928] 1 W.W.R. 553, 23 Alta. L.R. 233, [1928] 2 D.L.R. 154; *A.G. B.C. v. Neilson* [supra] applied."

not contradicted and is consistent with all of the surrounding circumstances. There is no reason not to adopt it. The condition of the building must therefore be considered in measuring the amount of damage sustained.

For this damage both respondents are liable. When lateral support to land is removed, it is immaterial whether the act which caused it was a negligent one. It is therefore not necessary in this action to determine whether or not the respondent Rittinger was in fact negligent in the way it carried out the work.

The fact that the land of the respondent Woolworth is not contiguous with that of the appellants, and that the said respondent was not an immediate neighbour of the appellants, does not preclude liability. As Willes, J., stated, in *Bonomi v. Backhouse* (1858), El. Bl. & El. 621, 120 E.R. 643, the right to support of land is a right of property analogous to the flow of a natural river, or of air. It was the act of the respondents which caused the adjoining land to move and caused the deprivation of natural support. Where the act occurred would be immaterial. In any event, the respondents did in fact excavate on the lane which was the adjoining land and are on that account liable.

The trial Judge did not make an assessment of damages. The evidence is such that the Court is able to make an assessment without the necessity of a reference back.

The roof of the building has been repaired at a cost of $1,350. In addition, the appellants claim that they should have the cost of tearing down and rebuilding a portion of the north wall, estimated at $35,000. This would be an entirely unreasonable expense for the appellants to incur to repair damage of the kind involved here. The appellants are, however, entitled to the fair cost of repairing and restoring the building.

Several of the witnesses called by the respondents indicated how the building could be repaired and gave varying estimates of the cost. The method of repair suggested by them appears to be a reasonable one. The major items, in addition to the roof, taking the estimated figures most favourable to the appellants, are:

(a) building up and levelling the concrete floor in the service area ..... $ 480
(b) underpinning the footing under the corner post $1,000
(c) closing and repairing the crack in the north wall $ 700

In addition to these items, allowance should be made for the probable cost of repairing the smaller cracks and of other incidental work not specifically referred to and compensate the appellants for time spent arranging the repairs and for the general inconvenience caused them. A fair and adequate allowance would be the sum of $4,500.

The appeal is allowed with costs. The appellants will have judgment for the sum of $4,500 and the costs of the trial. The appellants may include in their costs of trial the sum of $717.22 incurred by them to procure the evidence and attendance of the witness Bernard C. Laws.

Appeal allowed.

See also:

Langbrook Properties Ltd. v. Surrey County Council, [1970] 1 W.L.R. 161, (Ch. D.);
Lotus Ltd. v. British Soda Co. Ltd., [1972] Ch. 123 (Ch.);
Mascoli v. Betteride-Smith Construction Co., (1965), 49 D.L.R. (2d) 133, (Ont. H.C.);
Hage v. Dominion Stores Ltd., (1970), 1 N.S.R. (2d) 329, (N.S.S.C.);
Barber v. Leo Contracting Co. Ltd., [1970] 2 O.R. 197, (C.A.);
Eagles v. Royal Bank of Canada, (1972), 4 N.S.R. (2d) 59, (N.S.S.C.).
Brady v. Damon, [1972] Q.W.N. 37 (Qd. S.C.).

Englehart v. Martin and Martin (1978), 20 N.B.R. (2d) 646 (N.B.S.C.).

Note: Although there is no natural right to lateral support of a building, an easement of support may be acquired. See, for example, Rytter v. Schmitz (1974), 47 D.L.R. (3d) 445 (B.C.S.C.)

CHAPTER IV
FIXTURES

Problem:

John is a science enthusiast. In 1972 John purchased the fee simple estate in Blackacre and the fee simple estate in Whiteacre. The purchase price of Blackacre was $75,000 of which John paid $60,000 in cash, the remaining $15,000 being secured by a "take-back" mortgage in favour of Tom, the vendor of Blackacre. John, in 1972, commenced scientific experiments for the purpose of producing novel sound-waves. For the purpose of his experiments, John purchased from Peter, upon conditional sale, an electric generator, which he installed upon Blackacre and John purchased from Harry, also upon conditional sale, a "Multi-Sound Wave" unit, which he installed upon Whiteacre. To function efficiently, this unit had to be firmly embedded in Whiteacre and this unit was so embedded in Whiteacre by John. Thereafter, John purchased from Paul, upon conditional sale, a "Multi-Sound Wave" amplifier. John also purchased, for cash, a "Multi-Sound Wave" aerial. This aerial was attached by John to the "Multi-Sound Wave" amplifier. In February, 1974, John tired of his scientific experiments and conveyed "the fee simple estate in Whiteacre" to a purchaser, Jack, another science enthusiast. In the same month, John sold the "Multi-Sound Wave" amplifier (with the Multi-Sound Wave aerial attached) to James.

There has been default under the conditional sale agreement on the electric generator and the conditional sale agreement on the Multi-Sound Wave unit. Harry has sought to repossess the Multi-Sound Wave unit but Jack has refused Harry permission to enter upon Whiteacre and denies Harry's right to repossess. There has also been default under the mortgage of Blackacre and Tom, pursuant to his power as mortgagee, has re-taken possession of Blackacre. Peter has sought to repossess the electric generator but Tom has refused permission for Peter to enter Blackacre and denies Peter's right to repossess. There has also been default under the conditional sale agreement of the "Multi-Sound Wave" amplifier. Paul has repossessed this amplifier, together with the aerial attached thereto.

Discuss.

SECTION 1 General Principles

A fixture is a thing of a chattel nature which has been so affixed to land or to a building on land as to become in fact part of the land. Chattels so affixed in law lose their character as chattels and pass automatically out of the ownership of the person who owned them as chattels and become the property of the owner of the fee simple estate in the land; accordingly they thereafter pass with the land unless expressly excepted. These general rules may be expressed by the maxim: Quiquid planatur solo, solo cedit. To avoid confusion care should be taken to distinguish clearly between two different questions, i.e. has a chattel been so affixed as to become a fixture? And the further question, if it has been so affixed and has become a fixture can it lawfully be removed from the land by its former owner? To determine whether a chattel has become a fixture the governing consideration is said to be the intention of the person affixing the chattel. This "intention", however, is not the subjective intention of the party, but is the objective intention which may be inferred from the circumstances of the annexation. In determining this intention the court looks to the degree of annexation and the object of annexation.

The degree of annexation may be stated in this way. If a chattel is physically attached to the land or building prima facie it is a fixture and if it is not so attached but merely rests on the land by its own weight prima facie it is not a fixture. The object or purpose of annexation may be stated in this way. Has a chattel been affixed for its more convenient use as a chattel or for the more convenient use of the land or building as such? In ascertaining the object of annexation the court considers the nature of the chattel, the extent of the damage which would result from its removal, and the interest in the land of the person affixing the chattel. Whether a chattel has been so affixed to land so as to become part of it is a question of law. The question of whether a chattel has become a fixture arises (inter alia) in the following cases -- as between vendor and purchaser, landlord and tenant, tenant for life and remainderman, residuary legatee and devisee, mortgagor and mortgagee. If, applying the test above, a chattel remains a chattel, then its ownership remains unchanged and generally it may be removed by the person who brought it on to the land. On the other hand, if a chattel has become a fixture, it becomes the property of the owner of the land and the general rule is that it cannot therefore be removed by its former owner. There are however some exceptional cases where a chattel has become a fixture but its former owner has a right in certain circumstances to remove it from the land, e.g. landlord and tenant, and tenant for life and remainderman. At common law the rule that chattels which are fixed to the land so as to become fixtures become the property of the owner of the fee simple estate in the land applies notwithstanding that the person who brings the chattels on to the land is not their owner and has no authority to transfer ownership. But equity may modify this position. So also may statute.

And see, H. E. Dibble Ltd. v. Moore West [1970] 2 Q.B. 181 (C.A.). In this case the English Court of Appeal held that two greenhouses standing on dollies and not attached to the ground, had not become fixtures. In the course of this judgment reference was made to s. 62 of the English Law of Property Act, 1925. This section provides:

> **62.**—(1) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.
>
> .....

NOTE: In Wellsmore v. Ratford (1974), 23 F.L.R. 295 (A.C.T. Sup. Ct.), the plaintiffs allowed their fibreglass house to be exhibited by an exhibitor of building materials. The house was attached by steel spikes and welded steel plates to the floor of the exhibition building. Dunphy J. decided the fibreglass house was a fixture and accordingly, could not be distrained for rent by the exhibitor's landlord.

NOTE: In La Salle Recreations Ltd. v. Canadian Camdex Investments Ltd., (1969), 4 D.L.R. (3d) 549, (B.C.C.A.), it was held that wall-to-wall carpeting and rubber underpadding were annexed to the floor of a hotel in such a manner and under such circumstances as to constitute fixtures within the meaning of s. 12 of the Conditional Sales Act (B.C.).

Contrast this with Re Mitchell, Houghton Limited (1970), 14 C.B.R. (N.S.) 298, (Ont. S.C. in Bankruptcy), which was an application for a lien under the Mechanics' Lien Act for the price of and installation charges for a charpet and underpadding. In holding that no lien ought to be granted, Houlden, J., stated:

...

> I have been referred to the decision of *LaSalle Recreations Ltd. v. Can. Camdex Invts. Ltd.* (1969, 68 W.W.R. 339, 4 D.L.R. (3d) 549 (B.C.C.A.). Counsel are agreed that the method of installation of the carpet in the present case is identical with that described in detail in the *LaSalle* case, supra. However, unlike the *LaSalle* case, there was a tile floor under the carpet, not an unfinished plywood flooring. Counsel for the trustee submits that this distinguishes the instant case from the *LaSalle* decision and I agree with this submission. The carpeting was installed by a tenant of the building and if the tenant wished to leave the building, there is no reason why the carpet could not be removed and there would be a usable flooring left for a subsequent tenant. I do not think the carpeting was affixed in such a way as to create a claim for lien under s. 5 of The Mechanics' Lien Act.
>
> ...

(The above case was affirmed by the Ontario Court of Appeal on October 5, 1970: see (1970), 14 C.B.R. (N.S.) 298. See also, Re Patterson (1969), 12 C.B.R. (N.S.) 251 (Ont. S.C.) and Jones v. Lucas, [1953] 2 D.L.R. 221 (N.S.S.C.).

THE CONDITIONAL SALES ACT
R.S.O. 1970, c. 76, as amended

10.—(1) Subject to subsection 2 and section 14, where the goods, other than building material, have been affixed to realty, they remain subject to the rights of the seller as fully as they were before being so affixed, but the owner of the realty or any purchaser or any mortgagee or other encumbrancer thereof has the right, as against the seller or other person claiming through or under him, to retain the goods upon payment of the amount owing on them.

14.—(1) In addition to any other registration made under this Act, notice of a contract (Form 1) may be registered in the proper registry or land titles office, and shall set out,

(*a*) the name and residence of the seller and the purchaser;

(*b*) a brief description of the goods sold;

(*c*) the amount owing on the goods sold;

(*d*) a description of the land upon which the goods are affixed or placed or are to be affixed or placed, sufficient for the purpose of registration, and where the land is registered under *The Land Titles Act*, also a reference to the number of the parcel of the land and to the register in which the land is registered in the land titles office.

.....

(3) The registration of a contract under this section shall be deemed to be actual notice to the owner of the land or an interest therein or to a subsequent purchaser, mortgagee or other encumbrancer of the land or an interest therein.

(4) Where the goods have become affixed to the land or are fixtures and there is already registered against the land a mortgage or charge, all payments or advances made on the mortgage or charge after the goods have become affixed or have become fixtures and before registration of notice of the contract under this section have priority over the rights of the seller under the contract.

18. This Act is repealed on a day to be named by the Lieutenant Governor by his proclamation and thereafter any reference in any Act or regulation to *The Conditional Sales Act* shall be deemed to be a reference to *The Personal Property Security Act*. 1967, c. 11, s. 4.

NOTE: Repealed by proclamation April 1st, 1976.

NOTE AND QUESTION: The predecessor of section 10 first appeared in 1897; the exception concerning building material was added in 1927. Section 14 was enacted in 1933, except for 14(4), which was added in 1938. Why except building material?

It was suggested during the argument that two persons might agree that a chattel should remain a chattel even if affixed to the realty. I know of no authority for this. I think that sometimes there is a confused idea that because a fixture, as between certain parties, may be detached from the freehold and be removed, it is therefore a chattel. But the law affecting fixtures is based upon the fact that as a matter of law a fixture is always part of the land. If fixtures were not land, but were simply chattels, notwithstanding their attachment to the realty, there would be no foundation for the development of any set of principles governing their removal. It is the fact that a fixture is part of the realty that causes the difficulty. Once a chattel is attached to the realty in such a way as to become a fixture, then it is land and no longer a chattel. By some agreement it may, nevertheless, belong to and be removable by some person who does not own the land to which it is affixed, but the title of the owner of the fixture, being realty, must be governed, as all other titles to realty are governed, by the Registry and Land Titles Acts.

In my opinion, the appeal ought to be allowed, and judgment entered for the plaintiff declaring that as against the plaintiff the defendant has no lien upon the lands in question (including, of course, the things which the defendant desires to remove), and an injunction, as asked, restraining the defendant from entering upon the lands and removing the things in question, and the costs of the action.

LATCHFORD, C.J., agreed with ORDE, J.A.

RIDDELL, MASTEN, and FISHER, JJ.A., agreed in the result.

Appeal allowed.

PROBLEMS:

1. What would have been the result had the plaintiff in Hoppe v. Manners purchased with actual notice of the conditional sale contract?

2. What would have been the result had the plaintiff in Hoppe v. Manners been the donee and not the purchaser of the former owner?

knew or should have known that the furnace had even been installed by the defendant rather than by the defendant's predecessor in title, who had sold it as part of the house. I am unable to find anything in the evidence on this point which in any way assists the defendant.

On the facts of this case the right of the vendor to resume possession is not in issue because it has not been exercised. The issue we are considering is between the defendant purchaser of the furnace and the mortgagee of the land who has taken a transfer thereof from the defendant.

It was contended by counsel for the defendant that the refusal by the third party to permit the plaintiff to repossess the furnace prevented the defendant from getting credit from the plaintiff for the amount the plaintiff could have realized on a resale. He therefore claimed his client was entitled to judgment for this amount against the third party.

I am unable to accept this contention. The plaintiff never took any steps to obtain repossession other than those described above. There is no evidence concerning the reason why legal action was not taken for this purpose. The only certain thing is that the plaintiff continued this action for the balance owing on the purchase price, which it had a right to do. Assuming that the plaintiff had also the right to repossess and sell, there was no compulsion to do so. The plaintiff's choice of procedure cannot give the defendant a claim against the third party. Of course, if the plaintiff had no right of repossession, the third party's refusal to permit it was justified and the defendant cannot be said to have suffered any loss therefrom.

With respect, for the reasons given above I do not agree with the conclusion of the learned trial Judge with regard to liability of the third party to indemnify the defendant. I would allow the third party's appeal and I see no legal reason why it should not be allowed costs, both here and in the Court below.

Appeal by third party allowed;
appeal by defendant dismissed.

PROBLEM:

In 1968 John purchased a furnace by way of a conditional sales contract from Tom. John owned the fee simple estate in Blackacre and this furnace was affixed to Blackacre. In 1969 John sold the fee simple estate in Blackacre to Peter. In 1970 John defaulted under the conditional sales contract. Tom has now instituted proceedings against John for the balance of the purchase price. Can John claim indemnity from Peter? Does it matter if Peter knew or did not know of the conditional sales contract when he purchased the fee simple estate in Blackacre?

See also, La Salle Recreations Ltd. v. Canadian Camden Investments Ltd. (1969), 4 D.L.R. (3d) 549 (B.C.C.A.); Brunswick of Canada Ltd. v. Hunter et al. (1971), 14 D.L.R. (3d) 769 (Sask. C.A.); General Steel Wares Ltd. v. Ford & Ottawa Gas (1965), 49 D.L.R. (2d) 673 (Ont.C.A.); Plaza Equities et al. v. **Bank of Nova Scotia [1978] 3 W.W.R. 385 (Alta. S.C., T.D.).**

CHAPTER V

ADVERSE POSSESSION

PROBLEM

John is a science enthusiast. In 1965, John purchased the fee simple estate in Blackacre, and the fee simple estate in Whiteacre. Blackacre comprises 30 acres of pasture land situate in a valley. Whiteacre comprises 20 a acres of mountainous land, and borders the western extremity of Blackacre. John decided that he would produce novel sound-waves by 'bouncing' a signal off the eastern face of Whiteacre, from a transmitter situated on Blackacre. As part of his experiments, John erected, at a cost of $5,000, an elaborate sound-proof booth, in which to record the results of his experiments. Only the southerly 10 acres of Whiteacre were essential to John in producing the sound-waves. John, therefore, decided he no longer required the northerly 10 acres of Whiteacre. In February, 1974, John accordingly conveyed the fee simple estate in these northerly 10 acres of Whiteacre to Peter. In March, 1974, Peter entered the northerly 10 acres of Whiteacre. On one of the level stretches of this property Peter came upon Jack. The facts reveal that Bill had first entered these northerly 10 acres of Whiteacre in 1963, and had thereupon built a summer fishing lodge. Bill had, thereafter, spent each summer at this fishing lodge, and had cultivated the surrounding land, amounting to a one-half acre. In 1969 Bill had purported to convey the fee simple estate of Whiteacre to Jack, although, at this date the paper title to the fee simple estate in Whiteacre was, as stated, vested in John. From the date of this purported disposition, Jack had continued to use this summer fishing lodge, and the surrounding one-half acre, in the same manner as that formerly enjoyed by Bill. The presence of the summer fishing lodge, and the presence of both Jack and Bill, had been unknown to John. John had, at all times, been engrossed in his experiments, and although in the course of his work, he had frequently entered upon the southerly 10 acres of Whiteacre, he had only seldom ventured upon the northerly 10 acres of Whiteacre. It is ascertained that the soundproof booth erected by John was not erected on Blackacre, as John had believed, but, due to an error in the title deed of Blackacre, was in fact erected on Greenacre, which property borders the eastern extremity of Blackacre. The fee simple in Greenacre is held by Paul. Paul had denied John permission to enter upon Greenacre. Paul has said to John, "This sound-proof booth is on my property, Greenacre. I did not know this when you built it, but there it is. It's mine, not yours. You keep off my property. I will pay you nothing for it. I'm going to use it as part of my recording business." Peter has requested Jack to vacate the northerly 10 acres of Whiteacre including the summer fishing lodge, and the surrounding one-half acre of cultivated land. Jack has refused to deliver up possession of this area to Peter.

Discuss.

28. In every case of a concealed fraud, the right of a person to bring an action for the recovery of any land or rent of which he or any person through whom he claims may have been deprived by the fraud shall be deemed to have first accrued at and not before the time at which the fraud was or with reasonable diligence might have been first known or discovered. R.S.O. 1960, c. 214, s. 28.

29. Nothing in section 28 enables any owner of land or rent to bring an action for the recovery of the land or rent, or for setting aside any conveyance thereof, on account of fraud against any purchaser in good faith for valuable consideration, who has not assisted in the commission of the fraud, and who, at the time that he made the purchase did not know, and had no reason to believe, that any such fraud had been committed. R.S.O. 1960, c. 214, s. 29. . . .

NOTE: In September, 1977, the Ontario Ministry of the Attorney General issued a Discussion Paper which contained a Discussion Draft of a Proposed Act which would alter the present Limitations Act, R.S.O. 1970, c. 246. No bill, however, has yet been introduced. Sections 3(2)(g), (h), 6, 8, 9 and 13 of the Proposed Act read as follows: ...

3.—(2) The following actions shall not be brought after the expiration of ten years after the date on which the right to do so arose, ...

(*g*) an action for possession of land where the person entitled to possession of the land has been dispossessed in circumstances amounting to trespass;

(*h*) an action for possession of land by a person who has a right to enter for breach of a condition subsequent, or a right to possession arising under a possibility of reverter in respect of a determinable interest. . . .

6.—(1) The running of time with respect to the limitation period fixed by this Act for an action,

(*a*) based on fraud or fraudulent breach of trust to which a trustee was a party or privy; or

(*b*) to recover from a trustee trust property, or the proceeds thereof, in the possession of the trustee, or previously received by the trustee and converted to his own use,

is postponed and does not commence to run against a beneficiary until that beneficiary becomes fully aware of the fraud, fraudulent breach of trust, conversion, or other act of the trustee upon which the action is based.

(2) For the purposes of subsection 1, the burden of proving that time has commenced to run so as to bar an action rests on the trustee. . . .

(6) Subsections 1 and 4 do not operate to the detriment of a *bona fide* purchaser for value. . . .

NOTE: In Earle et al. v. Walker, (1972), 22 D.L.R. (3d) 284, (Ont. C.A.), the plaintiffs had documentary title to a piece of land, and assumed that a fence running across the land near its extremity was upon the boundary line. The defendant, a neighbour whose land adjoined the plaintiffs', cut firewood, gathered berries, and tapped trees upon that part of the land beyond the fence. Upon the discovery that the land so used was included in their paper title, the plaintiffs brought an action seeking damages for trespass to the land, a permanent injunction restraining the defendant from trespassing upon the land, and for a declaration that the plaintiffs were the owners of the land in question.

In delivering the judgment of the Ontario Court of Appeal awarding nominal damages fixed at $1, the requested permanent injunction, and the requested declaration of title, Schroeder, J.A., stated:

> .... It has been well settled that where one has the documentary title to a piece of land and comes upon it and actually occupies a part thereof, he is considered in law in possession of the whole, unless another is in actual physical occupation of some part to the exclusion of the true owner. Here neither the defendant nor any other person was in actual possession in that sense, and the plaintiff being in actual possession of all the area contiguous to the disputed area, had sufficient possession. There being no other party actually in possession to the extent required to extinguish the plaintiffs' paper title under the Statute of Limitations, their title draws the possession to it: *Charbonneau v. McCusker* (1910), 22 O.L.R. 46 at p. 67.
>
> The defendant's user of the land in dispute, if, indeed, the evidence of such user can be related to this precise area, consisted of no more than isolated acts of trespass, the toleration of which by the plaintiffs conferred no legal right to the property or an interest therein upon the defendant. His alleged acts of possession were not actual, constant, open, visible and notorious occupation to the exclusion of the true owner and thereupon did not bar the plaintiffs' title. ....

However, in Homestake Holdings Corp. v. Booth, (1972), 24 D.L.R. (3d) 280, (Ont. C.A.), the plaintiff claimed possession of a parcel of land, based upon documentary title. The defendant claimed possession of a portion of that parcel of land, based upon two deeds from a man who they maintained had been for more than 10 years in open, actual, exclusive, continuous, and notorious possession of that portion of the parcel of land that the deeds covered. The defendant also claimed to have been in continuous possession since the time of the deeds. At trial, Anderson J. held that neither the plaintiff nor the defendant had a good paper title. He held that the plaintiff and the defendant were each entitled to title by possession of certain portions of land, and the plaintiff had a right of way over the defendant's portion. From the judgment at trial, the plaintiff appealed on the ground that he had a good paper title, and that he was entitled to possession of all the land. The defendant cross-appealed, and claimed, inter alia, that he was entitled to possession of the whole of the parcel of land in question. This cross-appeal was dismissed, the Court finding that the defendant had not made sufficient use of the portion of the lands that the cross-appeal concerned. In delivering the judgment of the Court of Appeal awarding the defendant possession of that part of the land covered by the deeds, McGillivray, J.A., assumed that the plaintiff had had good paper title, and continued:

> The submissions made by counsel for the plaintiff in this respect are that when one is a registered owner of lands and performs acts upon some portion of the lands, as found by the trial Judge, it establishes that he is asserting a right to possession of the whole. In this respect he depends upon a judgment of the Court of Appeal in England in *Fowley Marine (Emsworth) Ltd. v. Gafford*, [1968] 1 All E.R. 979. This was an

...

I would allow the appeal of the defendants with costs and vary the judgment at trial so that the judgment as varied would

(1) order that the plaintiff do recover against the defendant $100 for trespass,
(2) declare that the defendants' right to recover possession of and the defendants' title of and to the lands described above have been extinguished,
(3) order that the defendants do pay the plaintiff's costs of the action forthwith after taxation thereof,
(4) order that the defendants' countercláim be dismissed without costs.

Appeal allowed in part.

Note: In Attersley et al. v. Blakely et al. (1971), 13 D.L.R. (3d) 39 (Ont. Co. Ct.) a claim to title by adverse possession based on the occasional use of land for duck hunting and the pasturing of cattle failed. See also, Re MacEachern and MacIsaac (1978), 81 D.L.R. (3d) 20 (P.E.I.S.C., in banco). In H.A. Semple Ltd. v. Minister of Natural Resources (1976), 13 N.B.R. (2d) 198 (N.B.S.C., App. Div.) the occasional cutting of wood for fuel and pulp was held to be isolated acts of trespass, and a claim to title by adverse possession failed. See also, O'Neil et al. v. MacAulay et al. (1977), 21 N.S.R. (2d) 210 (N.S.S.C., T.D.). In Brewer v. Larkin and Larkin (1977), 13 Nfld. & P.E.I.R. 401 (P.E.I.S.C., in banco) a claim for adverse possession based on fourty years use of a driveway failed as the title holder also had used the driveway during this period. See also, Pitre and Pitre v. Robinson (1978), 15 Nfld. & P.E.I.R. 63 (P.E.I.S.C., in banco).

Section 3 OPERATION OF THE STATUTE AND CO-OWNERSHIP

NOTE: It is clear that, as a matter of common law, if A and B squat on land, they can acquire an interest as joint tenants as there will be, inter alia, unity of title. Co. Litt. 278; Bl. Comm. ii, 181. However, sec. 14 of the Conveyancing and Law of Property Act, R.S.O. 1970, c. 85, provides:

> 14. Where two or more persons acquire land by length of possession, they shall be considered to hold as tenants in common and not as joint tenants.

At common law, unless there had been an actual expulsion, possession of one co-owner was regarded as possession of the other or others. Fairclaim v. Shackleton, 2 Black W. 690. Thus, if A and B were co-owners of land the possession of A was, at common law, regarded also as the possession of B. This could work unfairly in two respects. First, in its application to strangers: if A was in actual possession and B was out of possession, a stranger, X, could not acquire a title against B no matter how long he squatted on the land. Secondly, between the co-owners inter se: if for any length of time B was out of possession, and A in actual possession, B's title would not be extinguished.

There was some argument before their Lordships as to whether the commencement of the time for making an entry or bringing an action was to be determined by reference to section 1 of the Act of 1874 or section 3 of the Act of 1833. It is, however, clearly settled and was not in dispute before their Lordships that section 3 does not limit the generality of section 1 but is only explanatory of that section and to settled cases where under section 1 there might be a doubt when time started to run, see *James* v. *Salter* [10]; *Governors of Magdalen Hospital* v. *Knotts* [11]; *Pugh* v. *Heath.*[12] In *James* v. *Salter* [13] it was assumed that a devisee could not take under any branch of section 3 and that section 1 of the Act of 1874 applied. The opinions of text writers (including Lord St. Leonards) have doubted the correctness of this assumption, see Darby and Bosanquet, pp. 306–308, but as whichever section is applicable, time started to run more than 20 years before action brought their Lordships do not think it necessary to express any opinion upon this question.

As the learned judge held it is clear that the petitioners' claim is barred by the Acts of 1833 and 1874 and their title is thereby extinguished by section 34 of the Act of 1833.

Their Lordships would like to express their thanks to Scarr J. for his most admirable judgment, full and lucid in relation to the facts and clear and accurate as to the law.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondents' costs of the appeal.

Note: Section 12 of the Imperial Real Property Limitations Act, 1833, referred to in Paradise Beach & Transportation Co. Ltd. v. Price Robinson, [1968] A.C. 1072 (P.C.), is similar to section 11 of the Limitations Act of Ontario. So too is section 14 of the Statute of Limitations, R.S.N.S. 1967, referred to in Meredith v. Attorney-General of Nova Scotia et al. (1969), 2 D.L.R. (3d) 486 (N.S.S.C., T.D.), extracted at p. 5.8.6.

Megarry and Wade, The Law of Real Property
(1975) 4th ed., pp. 1029-1031

(*c*) *Leases*

(1) LANDLORD NOT BARRED. Interesting questions can arise where a squatter bars a leasehold tenant. If L leases land to T for ninety-nine years and S occupies the land adversely to T for twelve years, S has extinguished T's title. But this has no effect on L's title: L has disposed of his right to possession for the term of the lease, and nothing done by third parties in the meantime will give it back to him. L cannot therefore eject S, since apart from any right of forfeiture [21] L will have no right of entry until the expiration of the term of T's lease; and S, being in possession, has the best immediate title.[22]

(2) SURRENDER. If, however, T surrenders his lease to L after time has run in S's favour, it is held that L is then entitled to eject S.[23] Thus T, whose title against S is bad, can nevertheless confer upon L a good title against S, and thus accelerate L's right to possession. This is said to follow from the fact that the lease remains valid as between L and T. But it is a notable departure from the principle *nemo dat quod non habet*.[24] It also virtually destroys the squatter's statutory title, by putting it into the power of the person barred (T) to have the squatter ejected by a third party (L). The operation of the Limitation Act, 1939, in respect of leaseholds is thus substantially curtailed.

(3) ACQUISITION OF REVERSION. If T acquires L's reversion after S has taken adverse possession, T has the same rights as L. Thus in one case,[25] where the reversion was purchased by T, a yearly tenant whose title as such had already been barred by another person, it was held that T acquired a fresh right of action at once by stepping into the landlord's shoes; the lease merged [26] in the freehold forthwith, for it was determinable by notice and T could not give notice to himself. The result is held to be the same even if the lease is for a fixed term of years which L could not determine, so that L could not eject S [27]; L's conveyance of the reversion thus gives T a power which L does not possess, despite the principle *nemo dat quod non habet*.

(4) CONTINUING LIABILITY OF TENANT. Where a tenant has lost his title to an interloper by adverse possession, he may still remain liable to the landlord on the covenants in the lease (*e.g.*, for rent) because of the continuing privity of contract. But since the leasehold estate is extinguished, there is no longer any privity of estate, so that if he were an assignee of the lease instead of the original tenant he would cease to be liable on the covenants when his title became barred.[28]

(5) LIABILITY OF SQUATTER. The position of S, the squatter in our example, is that he has a legal estate (probably a fee simple, as explained above) subject to L's right of entry at the end of the period of the original term. Having no privity of estate with L, S is not liable on the covenants in T's lease,[29] except so far as they may be enforceable in equity as restrictive covenants.[30] But if T's lease was determinable by notice, or contained a forfeiture clause, L can enforce these terms against S,[31] and so by threat of notice or forfeiture compel S to perform the covenants; and S has no right to apply for

Note: The Court of Appeal in Jessamine Investments Co. v. Schwartz, [1978] Q.B. 264 (Q.B.) considered the position of a sub-tenant who dispossesses his mense landlord, an assignee of a 99 year lease from the freeholder. The three members of the Court, Megaw and Stephenson L.JJ. and Sir John Pennycuick, delivered separate concurring judgments. Mrs. Schwartz, the defendant, and her husband had occupied a dwelling house under a weekly tenancy which after 1939, became a statutory tenancy within the meaning of the Rent Acts. Not knowing the whereabouts of the mesne landlord, they ceased to pay rent sometime around 1945. The Court applying Fairweather v. St. Marylebone Property Co. Ltd., [1963] A.C. 510, (Megaw L.J. dubitante), held that the Limitation Act applied to a protected tenancy and that Mrs. Schwartz acquired a possessory title with the result that the mesne landlord's title was extinguished as against Mrs. Schwartz but continued to exist as against the freeholder, until the 99 year lease expired by effluxion of time in 1973.

The Court also considered the question of whether Mrs. Schwartz, by the acquisition of a possessory title, had changed the character of her occupation so as to determine her status as protected tenant against the freeholder. In the course of delivering his reasons, Sir John Pennycuick stated at p. 153:

> One has then to consider whether a statutory tenant who acquires by operation of law a possessory title can properly be said to change the character of his occupation from that of a protected tenant to that of a person not protected by the Acts. Whether a tenant in any given case so changes the character of his occupation must depend on the particular nature of the old occupation and of the new occupation.
>
> In my judgment, this question should be answered in the negative in the present case: that is to say, I think that it should be held that Mrs. Schwartz did not change the character of her occupation. I see no inconsistency between the transformation by operation of law of a statutory tenancy into a possessory leasehold interest as against the mesne landlord and the continuance of a statutory tenancy as against the freeholder, and indeed the rest of the world.

Megaw, L.J. pointed out the injustice and irony of the Court holding otherwise. He quoted the trial judge at p. 158:

> "For Mrs. Schwartz it was said that it would be a monstrous thing if she were put into a worse position in the circumstances which have occurred than she would have been if Mrs. David had not disappeared and had collected rent regularly. If the law requires that I should make an order for possession against Mrs. Schwartz, then be it so."

NOTE: The position with respect to a tenant who encroaches on land owned by his landlord appears to be as follows. There is a presumption that the tenant holds the encroached land as an extension of the lands comprised in the tenancy and not adversely to his landlord. Accordingly, the Limitations Act cannot run in his favour. At the termination of the tenancy he must surrender the encroached land up to his landlord. This presumption may be rebutted by a communication to the landlord of the tenant's intention to hold the encroached land for his own benefit and not for the benefit of his landlord. See Smirk v. Lyndale Developments Ltd., [1975] Ch. 317 (H.C.); reversed on other grounds, Smirk v. Lyndale Developments Ltd., [1975] Ch. 317 (C.A.).

NOTE ALSO: Section 1 of the Statute of Limitations, R.S.N.B. 1973, c. L-8 provides, inter alia, that "land includes all corporeal hereditaments, any share or any freehold or leasehold estate in any of them". In Johnston v. Jones (1975), 10 N.B.R. (2d) 520 (N.B.S.C., T.D.), the New Brunswick Supreme Court, Trial Division held that the defendants had acquired ownership, by length of possession, to a right of way which had been granted to the plaintiffs, in 1916.

Section 5 RUNNING OF THE LIMITATION PERIOD - THE 'QUANTITY' REQUIREMENT

NOTE: Once the limitation period commences to run, there must be no interruption.

AGENCY COMPANY LIMITED AND TEMPLETON v. SHORT
(1888) 13 App. Cas. 793

The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—

On the 3rd of December, 1885, the appellants, as plaintiffs, brought an action against the respondent, as defendant, to recover fifty acres of land situated in the district of Botany Bay, in the county of Cumberland, in the colony of New South Wales.

The defence was the Statute of Limitations (3 & 4 Will. 4, c. 27), which was adopted in the Colony by the Act No. 3 of 1837.

The action came on for trial in September, 1886, before the late Chief Justice Martin and a jury.

For the present purpose the facts of the case may be stated very shortly. The land in dispute was, until recently, waste open bush. The plaintiffs at the trial proved a complete documentary title deduced from a Crown grant in 1810. But they failed to prove to the satisfaction of the learned judge at the trial that they or any person through whom they claimed had been in actual occupation of the land at any time during the period of twenty years immediately preceding the commencement of the action. On the other hand the defendant, who claimed to have purchased the land within the last few years, did not prove to the satisfaction of the learned judge that he and the person or persons through whom he claimed had been in continuous possession during the statutory period.

The Chief Justice told the jury that when any person went into possession of another person's land, and exercised dominion over it, with the intention of claiming it, and the Statute of Limitations thereupon began to run as against the owner of the land, such running was never stopped, notwithstanding that the intruder abandoned the land long before the expiration of twenty years from his first entry, and no other person took possession of such land, and the right of the true owner to the land would not again arise without an entry by such true owner with the intention of repossessing himself of such land. The Chief Justice also told the jury that at the expiration of the twenty years after such taking possession of the land, as against the true owner, his right of action was defeated, notwithstanding there may not have been twenty years' possession as against him.

A verdict was found for the defendant.

On the 27th of October, 1886, the plaintiffs applied for a rule nisi for a new trial on the ground of misdirection. The application was heard before the late Chief Justice, Faucett, J., and Windeyer, J., who refused the rule. The Chief Justice is reported to have said: "There is no doubt that there was evidence sufficient to justify the verdict of the jury as to the occupation of the land more than forty years ago, which caused the statute to run against the legal owner. That being so, there was no evidence whatever that the legal owner during that time ever retook possession, or even walked over the land. The statute having been set running there was nothing to stop it."

To this report Faucett, J., has been good enough to append

Parties may in succession gain possession of land adversely to the paper title holder.

NOTE: (i) If privity exists between the successive occupants it is clear that the statute operates and that accordingly the right of the paper title holder is barred and his title is extinguished.

For example:
In 1939 X dispossessed Y. In 1946 X sold the land to Z. At what date would Y's title have been extinguished? See Beaudoin v. Brown (1961), 28 D.L.R. (2d) 16; also see Robinson v. Osborne (1912), 8 D.L.R. 1014 (conveyance, but gap in possession); see McGibbon v. McGibbon, [1913], 9 D.L.R. 308 (N.S.C.A.) [devise]

(ii) Early cases raise the issue whether privity was necessary for this result to follow. See McConaghy v. Denmark (1880), 4 S.C.R. 609; Ryerse v. Teeter (1878), 44 U.C.Q.B. 8 (C.A.); Simmon v. Shipman (1888), 15 O.R. 301; Farren v. Pejepscot Paper Co., [1933] S.C.R. 388, [1933] 4 D.L.R. 92. See also annotation by Armour (1912), 8 D.L.R. 1021.

(iii) The present position appears to be that privity is not necessary.

For example:
In 1950 X dispossessed Y. In 1955 Z dispossessed X. At what date would Y's title be extinguished? See Willis v. Howe, [1893] 2 Ch. 545; Handley v. Archibald (1900), 30 S.C.R. 130, 137; Babbitt v. Clarke, [1925] 3 D.L.R. 55; Robinson v. Tucker, [1954] 2 D.L.R. 763; Fleet and Fleet v. Silverstein (1963), 36 D.L.R. (2d) 305.

(iv) It is essential that there should be no gap between the possession of the successive occupants.

For example:
In 1950 X dispossessed Y. In 1951 X vacated the land. In 1957 Z took possession.
At what date would Y's title be extinguished?
See the Trustee Agency Co. v. Short (1888), 13 App. Cas. 793; Handley v. Archibald (1900), 30 S.C.R. 130; Robinson v. Osborne (1912), 8 D.L.R. 1014.

(v) What is the meaning of "privity" in this context? In the American case of Illinois Steel v. Poczacka, 139 Wis. 23, 119 N.W. 550, (1909), the court stated that:

> "It is said that there must be privity between successive occupants but this does not at all mean that there must be privity of title. The privity between successive occupants required for the Statute of Limitations is privity merely of that physical possession and is not dependant upon any claim, or attempted transfer, or any other interest or title in land."

See an article by H. Ballantine in 32 Harv. Law Rev. 135.

(vi) What is the position as between successive adverse occupants.

For example:
In 1958 X dispossessed Y. In 1967 Z dispossessed X. Who is now entitled to possession of the land? What would be the result of an action for possession between Y and Z; also between X and Z? Assume that in 1974 X dispossessed Z. Would Z

succeed in an action for possession? What if in 1974, B, a stranger, evicted Z? See Cosbey v. Detlor (1911), 20 O.W.N. 668 (C.A.); Robertson v. Tucker (1954), 2 D.L.R. 736; also see C. v. B. (1938), 1 Res. Judicatae 302.

It is not permissible to import into this definition a requirement that the owner must be inconvenienced or otherwise affected by that possession. Apart from the cases relating to special purpose no authority has been cited to us which would support the requirement of inconvenience to the owner and we are not ourselves aware of any such authority. On the contrary, so far as our own experience goes, the typical instance in which a possessory title is treated as having been acquired is that in which a squatter establishes himself upon a piece of land for which the owner has no use. Indeed, if inconvenience to the owner had to be established it would be difficult indeed ever to acquire a possessory title since the owner if inconvenienced would be likely to take proceedings.

We conclude that, once it is accepted that the judge found, and could properly find, that the defendant's father took possession of the disputed land before the commencement of the limitation period, and in the absence of any evidence of special purpose on the part of the plaintiff, time began to run from such taking of possession, irrespective of whether the plaintiff suffered inconvenience from the possession, and that the defendant must be treated as having acquired a possessory title before the commencement of this action.

We think it right to mention that, upon the hearing of the appeal the defendant appeared in person and was unable to give us any assistance upon the law. Mr. Dunkels for the plaintiff gave us what help he could but we have been at a considerable disadvantage in deciding an important and difficult question. We would allow the appeal.

Appeal allowed with costs.
Declaration that defendant was owner and entitled to actual possession of disputed land.

NOTE: In Wallis's Cayton Bay Holiday Camp Ltd. v. Shellmex and B.P. Ltd., [1975] Q.B. 94, (C.A.), referred to in Treloar v. Nute, Lord Denning, M.R. and Ormrod, L.J. formed the majority of the Court and Stamp, L.J. dissented. In that case, the plaintiffs claimed possessory title to land which the defendant paper title holders had left unoccupied but which they intended to use eventually for its development potential in connection with a proposed new road. Both Lord Denning and Ormrod, L.J. held that the plaintiffs had not acquired title by adverse possession since the plaintiffs' use of the land did not interfere with the defendants' intended use and enjoyment of the land. Lord Denning's judgment proceeded on the basis, inter alia, that the plaintiffs' use of the land was to be ascribed to the licence or permission of the true owner. Lord Denning stated that the plaintiffs by using the land, knowing that it did not belong to them, impliedly assumed that the owner would permit them to do so; and the owner, by not turning the plaintiffs off the land, impliedly gave permission. Acts done under licence or permitted by the owner did not, Lord Denning, M.R. stated, give a licensee a title under the Limitation Act. Ormrod, L.J. held that the plaintiffs' acts in cutting the grass, grazing cattle and occasionally ploughing the land were trivial, relative to the defendants' interest in the development potential of the land, and so no dispossession had occurred. Stamp, L.J., dissenting, held that the plaintiffs displayed the necessary continuous and exclusive possession, and animus possidendi, to constitute adverse possession.

Note: See also Hayward v. Chaloner, [1968] 1 Q.B. 107 (C.A.); and see Riley v. Penttila, [1974] V.R. 547 (Vict. S.C.).

Section 8 THE EFFECT OF THE RUNNING OF THE LIMITATION PERIOD

"For true it is that neither fraud nor might can make a title where there wanteth right". (1)

In the mid-twelfth century there existed both proprietary and possessory actions for the recovery of land, once the "owner" had been disseised. However due to delay and resultant expense of the proprietary action [droital action], claimants for relief came to rely on the possessory actions. In the end result, title came to depend most heavily on which litigant had the better right to possession. (2) Ownership, consisting of that bundle of rights which a person has in relation to the land,(3) became intertwined and inseparably linked with possession and such is the situation today for the purposes of the squatter's acquired rights in relation to the land.

It came to be that possession was the ultimate root of all titles, synonymously expressed as "every title has its roots in seisin; the title which has its roots in the oldest seisin is the best title".(4) For many purposes possession came to replace the feudal requirement of seisin. With the perfection of the action of ejectment in the seventeenth century, seisin and possession became virtually synonymous terms.(5) As the action of ejectment became the primary vehicle for the recovery of land, and as ejectment was historically a branch of trespass arising on a disturbance of possession, the significance of possession, as opposed to the technical concept of seisin received further stimulus. Whereas the old possessory actions were based on

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(1) 8 Coke Rep. 153, 77 English Reports 707.

(2) It is perhaps fair to say that today with our advanced land titles registry system, R.S.O. 1970, c. 59, and the resulting dependence on title documents that the situation is reversing. See Gatz v. Kiziw, [1959] S.C.R. 10, for discussion of s. 23(1)(c) and s. 28(1) of the Land Titles Act, R.S.O. 1950, c. 197 (now s. 51(1)(3) and s. 58 of R.S.O. 1970, c. 234, although s. 58 does not exactly reproduce s. 28(1)).

(3) 28 Yale L. Jour. 721, 729 (1919). "To say that A owns a piece of land is really to assert that he is visited by the law with a complex - exceedingly complex, be it noted - aggregate of legal rights, privileges, powers, and immunities - all relating of course to the land in question. He does not own the rights, etc., he has them: because he has them, he "owns" in very truth the material object concerned; there is no 'convenient figure of speech' about it. To say that A has the fee simple in a piece of land is, therefore, to say not that he owns a particular kind of right in the land but simply that he has a very complex aggregate of rights, privileges, powers, and immunities, available against a large and indefinite number of people, all of which rights, etc., naturally have to do with the land in question."

(4) Pollock & Maitland, Hist. of Eng. Law vol. II, 46.

(5) In part due to the first Limitation Act 1623 at least for the position of adverse possession.

seisin, ejectment looked to possession. Subsequently the Real Property Limitation Act of 1833 made possession the basis of title.(6) Even though the action of ejectment was abolished in England in 1852,(7) the substantive law in an action for possession [which replaced the ejectment action] was developed from ejectment, with the concomitant emphasis on possession as the basis of title. Possession as a root of title through its historical development thus sheds light on part of the mechanism by which the squatter acquires his title.(8)

Possession alone gives the squatter a possessory title, good against the world, subject only to being defeated by the true owner's right to recover possession.(9) To perfect the squatter's title against the world, the joint operation of the Limitations Act and common law is required. The effect of the Statute has in the past been described as akin to a "Parliamentary Conveyance".(10) At present, however, it is generally agreed that the statute is negative in effect. The effect of section 4 is to deprive the "true owner" of his remedies or right of entry, while section 15 extinguishes his title to the land [after the required ten years possession by the squatter]. To twist the maxim, there is no right without a remedy, and the "owner's" remedies are taken away. One description of the workings of the statute is set out in Gray v. Richford,(11) where Strong J. referred to the statute in this way:

> "The Statute of Limitations is, if I may be permitted to borrow from other systems of law terms more expressive than any which our own law is conversant with, a law of extinctive, not one of acquisitive prescription - in other words, the Statute operates to bar the right of the owner out of possession, not to confer title on the trespasser of disseisor in possession. From first to last the Statute of 4 Wm. 4 says not one word as to the acquisition of title of length of possession, though it does say that the title of the owner out of possession shall be extinguished, in which it differs from the Statute of James, which only barred the remedy by action, but its operation is by way of extinguishment of title only."

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(6) Asher v. Whitlock, [1865] L.R. 1 Q.B. 1; Perry v. Clissold, [1907] A.C. 73.

(7) Common Law Procedure Act, sec. 3.

(8) Allen v. Roughley (1955), 94 C.L.R. 98.

(9) Asher v. Whitlock, [1865] L.R. 1 Q.B. 1 at 5; "possession is good against all the world except the person who can show a good title" just as the "diseisor's title was good against all but the disseisee."
Perry v. Clissold, [1907] A.C. 73 at 79:
"it cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the Statute of Limitations applicable to the case, his right is forever extinguished, and the possessory owner acquires an absolute title."
Followed in Taylor v. Towney, [1920] O.W.N. 559.

(10) See Scott v. Nixon (1843), 3 Dr. & War. 388, 407 also the decision of Lord Radcliffe in Fairweather v. St. Marylebone Property Company, [1963] A.C. 510 and p.535.

(11) [1878] 2 S.C.R. 431 at 454.

The resulting effect is that the "owners" title is snuffed out, and his remedies are barred, when the most essential incident or legal consequence of title, the right to recover possession is lost.(12) The statute does not operate as a conveyance, statutory or otherwise, for while a conveyance is positive the statute operates negatively. The owner's title being extinguished by the statute, there is nothing to transfer to the squatter.

The possession of land by the squatter gives him possessory title good against the whole world, save the "true owner".(13) The blemish on the squatter's possessory title is the "true owner's" right to recover possession within ten years, and when the "owner" loses this remedy [through the Limitations Act] with the consequent extinguishment of his title, the defective possessory title becomes cured. The squatter's possessory title rests on his possession protected at common law, while the owner's title and remedies are extinguished by the statute. The Limitations Act thus removes the sole threat to the squatter's possessory title. Thus, the precarious possessory title becomes an indefeasible possessory title effective from the date the squatter entered into possession, and resting on the infirmity of the rights of others to eject him.(14)

As a result, the squatter's possessory title is a derivative, not of the "true owner's" title but of possession as a new source of title, the investive fact being the dispossession of the "owner" and the exercise of possession by the dispossessor. The statute operates to remove the last threat to the squatter's title.(15) One mode of explaining this interim period between the squatter's entry into possession and the extinguishment of "true owner's" rights and remedies is what is called titles relative.(16) After the squatters possession two claims exist to the land, the efficacy of their claims being relative to certain other facts. "Ownership" as between the two rival claimants is based on the better right to

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(12) Ballantine, "Title by Adverse Possession", (1918), 32 Harv. Law Rev. 135.

(13) Asher v. Whitlock, [1865] L.R. 1 Q.B. 1: "The possession good against the world save one who can show a good title, the squatter can devise this law given state and also bring an action of ejectment against the trespasser, even if the statutory period has not yet run against the true owner ... possession is prima facie evidence of seisin in fee and the squatter can protect his possession against the world [save true owner] by proof of nothing more than his possession and the trespasser has no right to plead jus tertii, that is, the squatter's lack of title." See Beaudoin v. Brown, [1961] 28 D.L.R. (2d) 16 at 21.

(14) Atkinson's and Horsell's Contract, [1912] 2 Ch. 1 (C.A.) followed in Gahagan v. Sisson, [1943] O.W.N. 619 (C.A.)

(15) Compare to the acquisition of incorporeal hereditaments where the interest is not protected till the right asserted has run the full prescriptive period, and up till then it is a mere inchoate right. Whereas the squatter in possession can bring an action of ejectment from his first entry into possession.

(16) Megarry & Wade, The Law of Real Property, (1975), 4th ed., p. 1006.

possession. If the squatter dispossesses the "owner", the "owner" can recover the land, but as against the world the squatter's possession gives him a possessory title good against all save the "true owner". The effect is that the squatter can sue for trespass from the time of his possession just as the "owner" could. In addition, the squatter can devise or convey his possessory title. In the end result, the squatter's rights are subject to the "true owner's" rights to recover the land, and thus the squatter's interest is subject or relative to the "owner's" interest. The squatter is described as having a legal title, a fee simple absolute in possession.(17)

Two or more adverse estates in land can exist, with the validity of the possessory title relative to the status of the"owner's" title. If and when the statute bars the "true owner" the possessory title becomes the best claim, since the possessory title is now good against the whole world. However, the "true owner" can by entry or action within the required period assert his better title based on prior possession and thus the squatter's legal possessory title could be defeated.

In the case of Perry v. Clissold, [1907] A.C. 73, 79, the Judicial Committee of the Privy Council speaks of the "possessory owner" acquiring an "absolute title". In Gatz v. Kiziw, [1959] S.C.R. 10, 15, the court stated that:

> "If one has extinguished the right of the other to oust him or to disturb his possession, his rights against the other are commonly and accurately described as a title by possession."

In Brown v. Philips (1964), 42 D.L.R. (2d) 38 (Ont. C.A.) the court refused to grant to an adverse possessor a declaration of title, and to such a decision there appears to be general agreement.(18) As mentioned, the possessor acquires as a matter of common law, a possessory title good against the world. This title is acquired, not by virtue of any positive operation of the Limitations Act, but through his possession once the statute removes the "true owner's"title rights, and remedies, this possessory title of the squatter is, relative to all others, superior. It is based on the infirmity of anyone to dispossess him. The possessory title may be devised or conveyed, however, it is subject to easements(19) and restrictive covenants,(20) but not to covenants in a lease(21).

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(17) See, Wade, "Landlord, Tenant and Squatter", (1962), 78 L.Q.R. 541.

(18) Reaume v. Cote (1916), 26 D.L.R. 524 (Ont. S.C., App. Div.)

(19) Megarry & Wade, The Law of Real Property, (1975), 4th ed., p. 1028.

(20) Nesbet and Pott's Contract, [1906] 1 Ch.D. 386 (C.A.) where it was held that the land acquired by adverse possession could be sold. However, the purchaser would be subject to the restrictive covenants in the land, existing before adverse possession as restrictive covenants are not incident to but paramount to the estate of the true owner.

(21) Tichborne v. Weir (1892), 67 L.T. 735 where it was held that covenants in a lease, are incident to the estate of the true owner, since they are part of the leasehold estate which was extinguished and as a result do not bind the squatter, or his purchaser.

As a result, the title gained is a good title, and entitles the squatter to possession and virtually the whole bundle of rights which accompany "true ownership". The bundle of rights attached to true ownership is vested in the squatter, through the inability of anyone to dispossess him. Perhaps the suggestion could be made that underlying the refusal of the courts to grant an adverse possessor a declaration of title is the desire to protect:

(1) the true owner who may not have been a party to the action;
(2) reversioners; and
(3) remaindermen.(22)

However, a squatter is permitted to deal with the land as an owner by:

(1) granting him an injunction to prevent trespass by the true owner or anyone else;(23)
(2) allowing him to convey the land away;(24)
(3) devise the estate, or let it pass on his intestacy;(25)
(4) complete a contract for sale.(26).

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(22) See Limitation Act R.S.O. 1970, c. 246 secs. 5 and 6, also see Adamson v. Adamson (1887), 12 S.C.R. 563.

(23) Walker v. Russell, (1965), 53 D.L.R. (2d) 509 (Ont. H.C.) at 528.

(24) Asher v. Whitlock, [1865] L.R. 1 Q.B. 1.

(25) See Asher v. Whitlock, [1865] L.R. 1,Q.B. 1, and Miller v. Robertson (1904), 25 S.C.R. 80; see 3 D.L.R. 26; also see 1 D.L.A. 32.

(26) Atkinson's and Horsell's Contract, [1912] 2 Ch. D. 1 (C.A.).

Section 9 DISABILITIES

NOTE: The operation of the doctrine of disabilities is limited in Ontario.(1) Only two disabilities are recognized by the Limitations Act, 1970; (2) that is, infancy, mental deficiency, mental incompetency, or unsoundness of mind.(3) Formerly, there were also the disabilities of coverture,(4) imprisonment, (5) and absence from the jurisdiction.(6) The existence of the two remaining disabilities may operate so as to extend the running of the limitation period.

In order to so extend the running of the limitation period, the disability must have existed at the time the right of action first accrued. This is the effect of section 36 of the Act which talks of a disability existing "at the time at which" a right of action first accrues. If a disability does so exist, further provisions of section 36 confer upon the person under a disability (or upon the person claiming through him) an additional period during which the action may be commenced. This period is five years next after the time at which the person to whom the right first accrued ceased to be under such disability, or died, whichever of these two events first happened.

For example:

In 1955 X dispossessed Y. At this date Y was aged 7 years. At what date will Y's right of action be extinguished? Assume that, in 1955, Y was aged 20 years. Assume, alternatively, Y died in 1965. Does the right of action still exist? If so, in whom is this right of action vested? See Lauzon v. Menard (1923), O.W.N. 387.

NOTE: (i) A disability which arises subsequent to the accrual of a right of action has no effect.

For example:

In 1955 X dispossessed Y. At this date Y was of full age. In 1956 Y died and devised all his property, real and personal, to his children A and B. At the date of Y's death A was aged 10 years and B was aged 11 years. At what date will the right of action of A and B be extinguished? See Garner v. Wingrove, [1905] 2 Ch. 233; Thompson v. Marks (1848), 5 N.B.R. 659.

(ii) What meaning is to be given to the words "any such disability" in the concluding lines of section 36?

For example:

In 1955 X dispossessed Y. At this date Y was aged 11 years. In 1961 Y became unsound of mind. When will Y's cause of action become extinguished? See Borrows v. Ellison (1871), L.R. 6 Ex. 128. What difference, if any, would there be had Y become of unsound mind in 1966?

(iii) Section 36 is limited by the application of section 37. Section 37 sets an arbitrary twenty year period.

For example:

In 1945 X dispossessed Y. At this date, Y was aged 7 years. In 1955 Y became of unsound mind. This condition has remained unchanged to the present date. Can Y now maintain an action to recover the land?

(iv) By section 38, it is expressly stated that successive disabilities in different people are of no effect.

> For example:
> In 1955 X dispossessed Y. At this date Y was aged 12 years. In 1960 Y died and Z became entitled to the land. In 1960 Z was aged 10 years. At what date will Z's right of action be extinguished. See Murray v. Watkins (1890), 62 L.T. 796; Borrows v. Ellison (1871), L.R. 6 Ex. 128.

(v) In considering the disability of infancy, referred to in section 36, reference must be made to the Age of Majority Act, S.O. 1971, c. 98.

> For example:
> In 1958, X dispossessed Y. Y was at the time 6 years old. In 1974, Y sought to bring an action. Was his right of action extinguished?

If a person as bailiff, servant, agent, attorney, caretaker, guardian (whether natural or statutory) or in any other fiduciary character enters into possession of land for and on behalf of the owner, the possession is that of the owner and of those claiming under him. See Kent v. Kent (1891), 20 O.R. 158, 445. Also see Quinton v. Firth (1868), Ir. R. 2 Eq. p. 396, 415; McLeod v. McRae (1918), 43 O.L.R. 34. This principle may have application to the disability of infancy and may preclude the initial operation of the statute, for, as mentioned, the possession of the party taking possession may be in law the possession of the infant and accordingly the statute will not begin to run. The principle however depends for its application upon a finding that the person taking possession does so in some fiduciary capacity.

There is a presumption that a parent, in possession of land, owned by his infant child holds as guardian or bailiff for that infant. See Kent v. Kent, supra and the cases therein referred to. In Fry v. Speare (1915), 34 O.L.R. 632, it was stated that this presumption was not necessary for the the court's decision.

An appointed guardian, who holds land owned by an infant, clearly holds in a fiduciary capacity. In Hickey v. Stover (1885), 11 O.R. 106 and Clarke v. Macdonell (1891), 20 O.R. 564 it was held that the character of the guardian's possession changed upon the infant's attainment of majority and that the possession thereafter was of such a quality as to attract the operation of the statute. These cases were, however, overruled by Kent v. Kent, supra, which held that so long as possession continues, it is to be ascribed to the character in which the possessor entered into possession, and that the possessor cannot denude or divest himself of such character except by going out of possession and delivering up possession to the owner. See Fry v. Speare, supra.

The relevant law would appear to be set out in Quinton v. Firth (1868), Ir. R. 2 Eq. 396, 415:

> "Where any person enters upon the property of an infant,
> "whether the infant has been actually in possession or
> "not, such person will be fined with a fiduciary
> "position as to the infants: 1, whenever he is the
> "natural guardian of the infant; 2, when he is so
> "connected by relationship or otherwise with the
> "infant so as to impose upon him a duty to protect, or
> "at least not to prejudice his rights, and 3, when he
> "takes possession with knowledge in express notice of

"the infant's rights. Indeed the last ground is
"but an instance of the application of the general
"principle, that a person entering into possession
"of trust property, with notice of the trust,
"constitutes himself a trustee, in which case,
"unless he enters as a purchaser for value, and
"continues in possession for twenty years from his
"purchase, or unless the trust be merely constructive,
"the statute will afford no defence."

The position of a stranger who enters with notice of an infant title does not, however, seem entirely free from doubt. See Re Taylor (1881), 23 Gr. 640. But see Kent v. Kent, supra. Also see sections 42, 43, 44 of the Limitations Act 1970.

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(1) Annotations, D.L.R. Vol. 2 (1928), p. 1465:

> In the statute of 1833 the general 20-year period of limitation of entry or action was subject to an extension (in favour of a person who was under disability or some one claiming under him) for a further period of 12 years after such person ceased to be under disability or died, whichever of those two events first happened (sec. 16), provided that the entry must be made or the action brought within 40 years of the time when the right first accrued (sec. 17), and that additional time should not be allowed for the disabilities of successive claimants (sec. 18). These provisions were superseded by sees. 3, 5 and 9 of the statute of 1874 (which reduced the additional period allowed for disability from 10 to 6 years, and reduced the ultimate limitation of 40 years to 30 years), and the corresponding provisions in Ontario are R.S.O. 1914. ch. 75, sees. 40, 41 and 42, ... (R.S.O. 1970, c. 246, ss. 36, 37, 38.) The corresponding section of the English Act of 1874 (sec. 3) specifies "coverture" as one of the disabilities provided for. The Ontario statute was changed in this respect by 38 Vict., ch. 16. Hicks.v. Williams (1888), 15 O.R. 228. A disability arising after the right had accrued will not prevent the time from running. Murray v. Watkins (1890), 62 L.T. 796.

(2) R.S.O. 1970, c. 246.

(3) Limitations Act - Sec. 36, infancy, mental deficiency, mental incompetency, or unsoundness of mind. See Emes v. Emes (1865), 11 G.R. 325 - a physiological disability is of no consequence; also Trust and Guarantee v. Trust Corp. of Ontario (1901), 2 O.L.R. 97, a discussion of insanity as a disability. See the Interpretation Act, R.S.O. 1970, ch. 225, Section 30, 17-22.

(4) 1874 38 Vict. ch. 16, Cameron v. Walker (1889), 19 O.R. 212; Hicks v. Williams (1888), 15 O.R. 228; Farquaharson v. Morran (1862), 12 U.C.C.P. 311. [Coverture is still a recognized disability in British Columbia and Newfoundland].

(5) Tallman v. Mutual Insurance Co. (1867), 27 U.C.Q.B. 100 at 102 [imprisonment is no longer a disability in the common law provinces].

(6) Abolished by 1862, 25 Vict. c. 20 (Ontario). See Boulton v. Langmuir, (1897), 24 A.R. 618, 622 [where reference is made to this change in the law in Ontario].

NOTE: In September, 1977, the Ontario Ministry of the Attorney General issued a Discussion Paper which contained a Discussion Draft of a Proposed Act which would alter the present Limitations Act, R.S.O. 1970, c. 246. No bill, however, has yet been introduced. Sections 6, 7, and 8 of the Proposed Act read as follows: ...

6.—(1) The running of time with respect to the limitation period fixed by this Act for an action,

(*a*) based on fraud or fraudulent breach of trust to which a trustee was a party or privy; or

(*b*) to recover from a trustee trust property, or the proceeds thereof, in the possession of the trustee, or previously received by the trustee and converted to his own use,

is postponed and does not commence to run against a beneficiary until that beneficiary becomes fully aware of the fraud, fraudulent breach of trust, conversion, or other act of the trustee upon which the action is based.

(2) For the purposes of subsection 1, the burden of proving that time has commenced to run so as to bar an action rests on the trustee.

(6) Subsections 1 and 4 do not operate to the detriment of a *bona fide* purchaser for value.

7.—(1) For the purpose of this section, a person is under a disability,

(*a*) while he is a minor; or

(*b*) while he is in fact incapable of or substantially impeded in the management of his affairs because of disease or impairment of his physical or mental condition.

(2) Where a person is under a disability at the time his right to bring an action arises, the running of time with respect to a limitation period fixed by this Act is postponed so long as that person is under a disability.

(3) Where the running of time against a person with respect to a cause of action has been postponed by subsection 2 and that person ceases to be under any disability, the limitation period governing that cause of action is the longer of,

(*a*) the period which that person would have had to bring the action had that person not been under a disability, running from the time that the cause of action arose, or

(*b*) such period running from the time that the disability ceased, but in no case shall that period extend more than six years beyond the cessation of disability.

(4) Where a person having a cause of action comes under a disability after time has commenced to run with respect to a limitation period fixed by this Act but before the expiration of the limitation period, the running of time against that person is suspended so long as that person is under a disability.

(5) Where the running of time against a person with respect to a cause of action has been suspended by subsection 4 and that person ceases to be under any disability, the limitation period governing that cause of action is the longer of,

(*a*) the length of time remaining to bring his action at the time the person came under the disability; or

(*b*) one year from the time that the disability ceased.

8.—(1) Subject to subsection 3 of section 3, but notwithstanding a confirmation made under section 5 or a postponement or suspension of the running of time under section 6 or 7, no action to which this Act applies shall be brought after the expiration of thirty years from the date on which the right to do so arose.

(2) Subject to subsection 1, the effect of sections 6 and 7 is cumulative.

. . .

Section 10 NON-APPLICABILITY TO LAND UNDER THE LAND TITLES ACT

NOTE: In Gatz v. Kiziw, (1959), 16 D.L.R. (2d) 215, (S.C.C.), the respondent was the owner of land registered under the Land Titles Act of Ontario. During a period of 10 years the respondent had been openly, notoriously and continuously in possession of a strip of the appellant's land. The appellant's title had also been registered under the Land Titles Act, but prior to the commencement of the respondent's possession. The respondent brought an action seeking a declaration of title to the disputed land by right of possession. The trial judge rejected this claim and the Court of Appeal reversed the decision. On appeal, the Supreme Court of Canada held that the Land Titles Act protected a possessory interest acquired prior to the registration of land under that Act but that once land had been registered an interest or title could not be acquired by mere length of possession. The appeal was allowed.

Following the decision of the Ontario Court of Appeal, delivered on May 3, 1957, what is now s. 58(1) of the Land Titles Act was enacted as S.O. 1958, c. 49, s. 3.

NOTE: A right of way has been established before land is entered under the Land Titles Act, R.S.O. 1970, c. 234, Is the title to the land subject to the right of way, not only at the time of the first registration but also on all following transfers? See Aluminium Goods v. Federal Machinery Ltd. et al. [1970] 2 O.R. 235 (H.C.).

THE LAND TITLES ACT
R.S.O. 1970, c. 234, as amended

...

51.—(1) All registered land, unless the contrary is expressed on the register, is subject to such of the following liabilities, rights and interests as for the time being may be subsisting in reference thereto, and such liabilities, rights and interests shall not be deemed to be encumbrances within the meaning of this Act:

...

3. Any title or lien that, by possession or improvements, the owner or person interested in any adjoining land has acquired to or in respect of the land.

...

58.—(1) Notwithstanding any provision of this Act, *The Limitations Act* or any other Act, no title to and no right or interest in land registered under this Act that is adverse to or in derogation of the title of the registered owner shall be acquired hereafter or be deemed to have been acquired heretofore by any length of possession or by prescription, but this section is not binding upon a judge in respect of any order made by him under section 162.

(2) This section does not prejudice, as against any person registered as first owner of land with a possessory title only, any adverse claim in respect of length of possession of any other person who was in possession of the land at the time when the registration of the first owner took place.

See: Montreal Trust Co. v. Murphy (1967), 59 D.L.R. (2d) 634 (Sask. C.A.).

See also: Ward v. Kirkland, [1966] 1 W.L.R. 601 (Ch. Div., H.C.): E.R. Ives Investments Ltd. v. High, [1967] 2 Q.B. 379 (C.A.); Siew Soon Wah v. Yong Tong Hong, [1973] A.C. 836 (P.C.); Jones v. Jones, [1977] 1 W.L.R. 438 (C.A.).

NOTE: In Hussey v. Palmer, [1972] 1 W.L.R. 1286, (C.A.), the plaintiff spent a sum of money for an extension on the house of her son-in-law, the defendant, on the understanding that she would subsequently be allowed to live there. After 15 months in the house, personal differences arose, and the plaintiff moved out. She subsequently brought this action claiming the sum expended on a resulting trust. The majority of the Court of Appeal (Cairns, L.J., dissenting) held that a resulting (termed 'constructive' by Lord Denning, M.R.) trust existed. In his judgment, Lord Denning, M.R., cited, inter alia, Inwards v. Baker (supra), and continued:

> In those cases it was emphasized that the court must look at the circumstances of each case to decide in what way the equity can be satisfied. In some by an equitable lien. In others by a constructive trust. But in either case it is because justice and good conscience so require....

Note also: Benoit v. Benoit (1976), 15 N.B.R. (2d) 59 (N.B.S.C., Q.B.D.).

NOTE: In Gay v. Wierzbicki, (supra), Laskin, J.A., stated:

> "Accepting that s. 38(1) applies only to mistakes of title (as contrasted with mistakes of identity), the parties in the present case and the trial Judge proceeded on the basis that the mistake here was of that character. I am of the same opinion."

Section 38(1) was accordingly applied by the Court. If a mistake of identity is different from a mistake of title, should section 38(1) be restricted to situations involving the latter? In any event, is the distinction meaningful? Reference may be made to the following statutory sources.

The predecessor to the present s. 38(1) of the Conveyancing and Law of Property Act first appeared as S.O. 1873 (36 Vict.), c. 22:

> An Act for the protection of persons improving Land under a Mistake of Title.
>
> [*Assented to 29th March*, 1873.]
>
> HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—
>
> 1. In every case in which any person has made, or may make, lasting improvements on any land under the belief that the land was his own, he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of such land is enhanced by such improvement.

Prior to the above statute, there was a provision concerning mistakes caused by 'unskilful surveys'. It first appeared as 59 Geo. III, Third Session, c. 14, s. 12(1818):

> XII. *And be it further enacted by the authority aforesaid,* That if any action of ejectment shall be brought against any person or persons, who after these lines have been established by virtue of this Act, shall be found, in consequence of unskilful Surveyors, to have improved on land not his, her, or their own, it shall and may be lawful for the Judge of Assize, before whom such action is tried, to direct the Jury to assess such damages for the defendant or defendants for any loss he, she, or they may sustain in consequence of any improvement made before such action is commenced, and also assess the value of the land to be recovered, and if a verdict shall be found for the plaintiff or plaintiffs, no writ of possession shall issue, until such plaintiff or plaintiffs have tendered or paid the amount of such damages, as aforesaid, or shall release the said land to the defendant, provided the said defendant shall pay or tender to the plaintiff the value of the land so assessed, before the fourth day of the ensuing term.

In 1887, the 1873 statute appeared as s. 30 of the Law and Transfer of Property Act, R.S.O. 1887, c. 100.

The unskilful survey provision had subsequently appeared as section 53 of the Survey of Lands Act, C.S.U.C. 1859, c. 93. In the 1877 revision of the statutes, it became section 29 of the Ejectment Act, R.S.O. 1877, c. 51, appearing under the heading of "damages to defendant for improvements made on land not his own in consequence of unskilful survey". In 1887, it became s. 31 of the Law and Transfer of Property Act, R.S.O. 1887, c. 100.

(see over)

CHAPTER 7

PROBLEMS FOR REVIEW

1. By his will, John, who died in 1950, devised his two properties, Blackacre and Redacre in this way: "I devise Blackacre to my son Richard forever; I devise Redacre to my son Peter and the heirs of his body."

(a) Blackacre consisted of 20 acres of undeveloped, but enclosed land.

John in 1949, had made application to the planning board for approval of a plan, subdividing this property into lots so as to erect thereon single family dwelling houses. The necessary approval was not given and the subdivision could not take place. In 1952, Richard renewed this application. In 1960, Jasper entered on Blackacre. He lived in the cottage that was situated on the north-eastern corner of the property and began to cultivate a strip of land approximately 5 acres in area. Quite often he walked over the remainder of Blackacre, assessing its potential, cutting wood for use at the cottage and fishing in a stream that ran through the land.

In 1968, Tom, believing, wrongly, that Frank was the owner in fee simple of Blackacre, entered into negotiations with Frank for the purchase of Blackacre. In that year, Frank, believing that he had legal title to Blackacre, executed a deed purporting to convey Blackacre to Tom, though this deed was, of course, a nullity.

Tom, immediately thereafter, entered upon Blackacre and showed the deed to Jasper. Jasper then vacated the land, and Tom took up residence in the cottage, where he has lived ever since, continuing the same use of Blackacre as was made by Jasper.

Tom now seeks a declaration from the court that by virtue of The Limitations Act, R.S.O. 1970, c. 246, he is the owner of the fee simple estate in Blackacre.

Should he succeed?

(b) In 1950, John leased Redacre to Harry for a term of 30 years. In 1954 Dick entered upon Redacre and evicted Harry. In 1965, Harry executed a deed whereby he surrendered to Peter "whatever interest I now possess in the term of 30 years granted to me" by the 1950 lease.

Peter has now commenced proceedings for the possession of Redacre from Dick.

Should he succeed?

(c) In 1967 Tom contracted with Simon to build an annex onto the cottage and generally to modernize this building. Paul, an employee of Simon, while engaged in this reconstruction, discovered an iron box embedded in one of the walls. Paul took this box to Simon who told him to leave it in the garage. Simon told Tom what had happened. Thereafter Tom said to his son, Bill "an old iron box has been found in the wall of the cottage. It is somewhere around here. It may be in the garage. Anyway if you find it you can have it." Bill found the box in the garage. In the meantime Paul had opened the box. The box contained $10,000. This sum is claimed by Paul, Simon, Tom, Bill and Richard.

Discuss.

* * * * *

2. In 1955 Stuart conveyed the fee simple estate in Blackacre to John. The south boundary of Blackacre bordered onto Whiteacre owned by Bill. A fence divided these two properties but the paper title of Blackacre, as evidenced in the deed to John in 1955, did not include a strip of land 25' wide. This strip of land was part of Whiteacre and formed the northerly portion of Whiteacre, although it lay north (i.e. on the Blackacre side) of the fence dividing Blackacre and Whiteacre. In 1964 John sold Blackacre to Bruce. From 1955-1964 John had used this 25' strip as part of Blackacre, cultivating flower beds on this strip and mowing the lawn. From 1964 to date Bruce continued this use.

(a) Advise Bill and Bruce as to the ownership of the fee simple estate in the 25' strip of land.

(b) How, if at all, would your answer be different on the assumption that in 1955 Bill had been aged 12 years.

(c) Assume that John acquired Blackacre not in 1955 but in 1963. Assume also that John had built a swimming pool on Blackacre and that the southerly end of this pool had extended 10' into the 25' strip of land. Bill objects to this intrusion. Advise Bruce.

* * * * *

3. John is an elephant enthusiast. He decided to fulfill his long-held ambition; that is, to provide a home for restless elephants. Tired of apartment living he moved, in January, 1958, with his elephants to 500 acres of rolling country. This 500 acres comprised two properties. The westerly property, consisting of 200 acres, called Blackacre; and the easterly property, consisting of 300 acres, called Whiteacre. John had purchased the fee simple estate in each property from Tom on the 1st of January, 1958. Immediately he set to work to develop Blackacre and by January, 1967 good progress had been made. Whiteacre had hardly been touched and John did not intend to commence the development of Whiteacre, the Second Development Stage, until 1970. In 1968, to mark the completion of the First Stage of Development, the development of Blackacre, John built a large wading pool on the westerly extremity of Blackacre.

In 1968, while strolling over Whiteacre, contemplating the commencement of the Second Development Stage, John saw Bill. Unknown to John, Bill had moved onto Whiteacre in 1965. Bill had built a small cabin for himself on Whiteacre where he had lived ever since, keeping very much to the immediate vicinity of this cabin. John told Bill to leave Whiteacre immediately, but Bill refused, and still refuses to do so. At about this same time John was also annoyed to discover that a motion picture studio had built a platform on Greenacre, to the north of Blackacre, and were photographing his elephants. He protested but they refused to cease this activity saying that they needed this film as background material for a forthcoming production and that it was cheaper to obtain background material in this way than to incur the expense involved in filming on location overseas.

In 1969 John decided he would increase his elephant herd. He set off on an expedition to capture wild elephants. Before setting sail he said to Harry: "If anything happens to me, my elephants are yours". John returned safely from his quest but died of a heart attack shortly thereafter.

The facts now show that on the 1st of January, 1958, when Tom purported to convey the 500 acres to John, both parties acted under a misapprehension. Although he was unaware of it at the time, and although he did own the fee simple estate in Blackacre, Tom did not own the fee simple estate in Whiteacre. The fee simple title to Whiteacre was then vested in Dick, who in 1958 was aged 17 years and who now claims possession of Whiteacre. The facts further show that the wading pool built by John on Blackacre extends some 25 feet over the westerly boundary line of Blackacre thereby encroaching onto Blueacre, an adjacent property owned by Adam. Adam objects to this encroachment.

Discuss the issues raised by this question.

* * * * *

4. John is the owner of the fee simple estate in Blackacre. Blackacre is situated at the top of a hill and John is a skiing enthusiast. Next to Blackacre, going down the hill is Whiteacre and at the bottom of the hill is Greenacre. Jasper had purchased Greenacre in 1955. In 1957 Tom, who owns Redacre, a farm on the other side of Greenacre, entered upon Greenacre and, until 1966, had used Greenacre as an extension of his farm. In 1966, however, John built a cabin on Greenacre. While building this cabin Simon, John's servant, unearthed a valuable diamond ring, though this ring has since been mislaid. Since 1966 John has frequently practised ski-jumping by leaping from Blackacre, crossing over Whiteacre, and landing upon Greenacre, much to the annoyance of Richard who owns the fee simple estate in Whiteacre. To assist in his ski-jumping practice John erected upon Blackacre several very large electric fans which, he considered, would create the optimum air currents. The fans were secured to steel posts which were embedded firmly into the ground of Blackacre. Indeed, at a point 3'6" below the surface they extend some 2 1/2" into Whiteacre. John has now sold Blackacre to Paul. No mention was made in the contract, or in the conveyance, of the electric fans.

Advise all parties as to their position in relation to all the issues contained in this question. Give reasons.

* * * * *

5. John is a buried treasure enthusiast. In 1963 John purchased the fee simple estate in Blackacre. In that year John discovered what appeared to be an ancient smuggler's map. The southern boundary of Blackacre is formed by Lake Splendid. This ancient map indicated that Blackacre had, long ago, served as a smugglers' headquarters, and that the smugglers had concealed their treasure in a natural cave that was located near the northern boundary of Blackacre. John searched long and hard for the entry to this natural cave, and, one day in November 1963, he was rewarded by success. Blackacre rises sharply from Lake Splendid and near the northern boundary of Blackacre, at the foot of a hill, behind a large boulder and concealed by years of undergrowth, John discovered the entrance. John immediately plunged into the unknown and discovered a truly wonderous cavern. From that day in November, 1963 until June, 1972, John frequented this

cavern. Electric lighting facilities were installed to enable John to search for buried treasure and also to enjoy the beauty of the cavern. Indeed, not infrequently, John spent several days at a time down in the cavern and, towards the southern half of the cavern, John erected a comfortable cabin, and adjacent thereto John cultivated mushrooms in a kind of "kitchen garden", which "kitchen garden" John enclosed with a picket fence. Unable to locate any buried treasure, John,in June, 1972 sold the fee simple estate in Blackacre to Jack. John had long known Jack. Indeed, in 1966, Jack had loaned John a transistor radio. In 1967 Jack had requested John to deliver to him this transistor radio but John did not comply with this request. Though not a buried treasure enthusiast, Jack continued the same use of the cavern and cabin as that enjoyed by John. The primary reason for Jack's purchase of the fee simple estate in Blackacre was Jack's liking for speedboat riding. In 1970 John had purchased from Bill, on conditional sale, a superb outboard motor. John had fixed this outboard motor to his speedboat, 'Loud-and-Noisy'. When Jack purchased the fee simple estate in Blackacre in June, 1972, John also sold to Jack this speedboat. This sale took place in this way. John said to Jack "Do you want to buy my speedboat, 'Loud-and-Noisy'. If so, its yours for $1,500." Jack replied, "I've always wanted a speedboat like that. Right, its a deal." The northern boundary of Blackacre joins the southern boundary of Whiteacre. The fee simple estate in Whiteacre is owned by Peter. In 1974 Peter decided to prospect for oil. In November, 1974, Peter employed Paul to drill a test well near the southern boundary of Whiteacre. In December, 1974, Peter and Paul were at this site, when, at a depth of 100' below Whiteacre, the drill entered the ceiling of the cavern. Peter and Paul were lowered down the test well and came upon Jack who was, at that moment, relaxing in the cabin. Facts established that the northern extremity of the cavern, including the "kitchen garden", but not including the cabin, is located, not under Blackacre, but under Whiteacre. As he came to light on the floor of the cabin, Paul saw a valuable brooch. Apparently this brooch had been embedded in the soil of Whiteacre and had been dislodged by the drilling operation. Paul picked up this brooch and stated "Look what I've found". Peter said, "Let me have it, I'll see to whom it belongs", and Paul handed this brooch over to Peter.

Peter claims that the land under Whiteacre is his and has requested Jack to vacate this land. Jack refuses and asserts that he has enjoyed this land as part of Blackacre. At the date of the sale of 'Loud-and-Noisy' by John to Jack, $500 remained owing under the conditional sale contract of the superb outboard motor. Bill demanded this sum from Jack. Jack replied to Bill, "'Loud-and-Noisy' is mine. I don't owe you anything". Bill demanded repayment from John. John paid Bill this $500. John now claims the return of the superb outboard motor from Jack, or alternatively, $500 by way of indemnity from Jack. When Jack took possession of 'Loud-and-Noisy', he found in a cabin the transistor radio he had loaned to John in 1966. This transistor radio was not included in the sale of this speedboat and John now claims its return from Jack. Jack refuses to deliver this transistor radio to John. No-one has claimed the valuable brooch and both Paul and Jack now seek its return from Peter, who claims that he is entitled to retain this brooch.

Discuss <u>ALL</u> the issues raised in this problem.

6. John is a snow enthusiast. In 1965,John purchased from Jack the fee simple estate in Blackacre. Blackacre comprised a two-acre plot of land situated in the suburbs.

In 1976, John determined that he would gather on to his land all available snow. Accordingly, from the fall of the first snow in the winter of 1976, John commenced this formidable task. Gradually, as the winter progressed and as 1976 became 1977, the accumulation of snow on John's land increased to dramatic proportions. John concentrated his show gathering activity upon the easterly one acre of Blackacre. Whiteacre is situated to the east of Blackacre. The fee simple estate in Whiteacre is owned by Tom.

Jim, a friend of John's, knew of John's enthusiasm. One day in January, 1977, Jim arrived at Blackacre. In the back of Jim's station wagon was a large barrel, full of snow. Jim called to John: "Look what I have brought you, a barrel full of snow. I shovelled this snow from the highway into my barrel. I want my barrel back but you can have the snow it contains. It's yours, all yours." "Oh boy," exclaimed John, "more snow and it's mine, all mine." John and Jim unloaded the barrel from Jim's station wagon, carried it to the eastern extremity of Blackacre and tipped out the snow. John and Jim stood back to admire this mound of new snow. Suddenly, John and Jim each saw at the top of this mound a glittering object. This object was a valuable diamond ring. This valuable diamond ring had, unknown to both John and Jim, been contained in the snow that Jim had shovelled from the highway. Jim exclaimed: "That diamond ring is mine - I did not give it to you; I only gave you the snow." Both John and Jim lunged forward, arms outstretched, to reach the valuable diamond ring; but both John and Jim slipped in the snow. The valuable diamond ring gently rolled down the mound of snow, crossed the boundary line between Blackacre and Whiteacre, and came to rest upon Whiteacre. Tom had been standing on Whiteacre, and had heard and seen all that had transpired between John and Jim. Tom picked up the valuable diamond ring and stated: "Well, this valuable diamond ring is on my land, Whiteacre; so neither of you can have it. It's on my land and so it's mine, all mine." Whereupon Tom, clutching the valuable diamond ring, turned on his heels and walked away across Whiteacre.

In February, 1977, John purchased from Peter, on conditional sale, a "Magnificent Snow-Ball Catapult". The total cost of this "Magnificent Snow-Ball Catapult" was $1,500. John paid a cash deposit of $100 and Peter retained a security interest, to cover the unpaid balance of $1,400. John firmly installed this "Magnificent Snow-Ball Catapult" on the easterly one acre of Blackacre in this way: John dug a three foot by four foot trench, poured concrete into this trench to provide a concrete platform and bolted the base of the "Magnificent Snow-Ball Catapult" on to this concrete platform. Thereafter, John would spend many a snowy day with this apparatus. Dick, another of John's friends, owned the fee simple estate in Greenacre. Greenacre is situated at the east of Whiteacre: that is, Whiteacre is situated between Blackacre and Greenacre. John would, with the aid of this "Magnificent Snow-Ball Catapult", lob snowballs from Blackacre to Greenacre. None of these snowballs ever landed on Whiteacre, but instead would fly slowly over Whiteacre, passing lazily over the tree-tops and land on Greenacre. Dick did not object to this activity by John. But Tom did so object. In March, 1977, Tom said to John: "This has got to stop. Every time I walk into my garden I see your snowballs flying over my land, Whiteacre. Please stop this activity at once." John, nevertheless, continued this activity and in April, 1977, Tom commenced appropriate proceedings against John.

In June, 1977, John tired of his enthusiasm and sold the fee simple estate in the easterly one-acre of Blackacre to Paul. Neither the contract of sale of this easterly one-acre, nor the conveyance to Paul, made any reference to the "Magnificent Snow-Ball Catapult." John is in default of his payments under the conditional sale contract of this apparatus. Peter, in accordance with the provisions of this contract, now wishes to enter this easterly one-acre of Blackacre and repossess the "Magnificent Snow-Ball Catapult". Paul, however, objects to Peter's entering upon this land.

On the occasion of this sale of the easterly one-acre of Blackacre, John commissioned a survey of the whole of Blackacre. As a result of this survey, it is ascertained that the westerly boundary of Blackacre in fact runs some four feet further west than John had supposed. Harry owns the fee simple estate in Blueacre. Blueacre is situated to the west of Blackacre. In November, 1977, John said to Harry: "You've seen the survey. This four feet of land is mine. I know that I have never set foot on it, but it's covered by my deed." Harry replied: "No it's not yours. It may be covered by your deed but I purchased Blueacre from Jasper in 1970. Ever since then I've used this four foot strip of land as part of my garden. And on one part of it, I have my toolshed where I keep all my gardening equipment. So it's no longer yours." The facts establish that Harry had so utilized this four foot strip of land. And the facts further establish that Jasper, who had owned the fee simple estate in Blueacre since 1960, had first entered this four foot strip of land in 1966 and had built thereon the toolshed in 1967. Thereafter, Jasper had used this four foot strip of land as part of the garden of Blueacre, a use continued by Harry.

Harry refuses to relinquish possession of this four foot strip of land to John. Advise John and Harry. Advise Peter whether he can enter the easterly one-acre of Blackacre, against Paul's wishes, in order to repossess the "Magnificent Snow-Ball Catapult". As between John, Jim and Tom, advise who is entitled to possession of the valuable diamond ring. Tom seeks your advice as to the proceedings he instituted in April, 1977, against John: advise Tom.

CHAPTER 8

THE ESTATE IN FEE SIMPLE

PROBLEM:

John was a real estate enthusiast. He held the fee simple estate in Whiteacre, Greenacre, Bluearce and Redacre, and a life estate in Blackacre. In 1971, he conveyed "Blackacre to Jim". In 1972, he conveyed "Whiteacre to the Multi-Sound Corp.", a duly incorporated Ontario company. In 1978, John died. His will made, inter alia, two dispositions. One was a devise of Blueacre "to all of my children living at the date of my death, as tenants in common in equal shares". At the date of John's death, he had three living children. Two were legitimate, but Fred, the third, was illegitimate. John had a friend, Jim, who died shortly after John. Jim did not leave a will. His estate consisted of both realty and personaly. Jim left him surviving only his wife, Jane. He left no other persons entitled under the Succession Law Reform Act, 1977.

Discuss.

SECTION 1 General Nature

> "The word 'estate' is a word of the widest signification and was used in its popular sense by the deceased as comprising his collective assets and liabilities. His assets, for this purpose, would include the real estate specifically devised to his brother."
>
> Re Malott (1968), 67 D.L.R. (2d) 187 (Ont. C.A.).

NOTE:

The fee simple estate is the greatest estate that can exist at law and is, in practice, treated as absolute ownership. The word "fee" indicates an estate of inheritance - that is, one which on the death of the tenant for the time being would, at common law, descend to the heir. The word "simple" means that the fee was capable of passing to the heir general and was not, as in the case of a fee tail, restricted so as to descend to a particular class of heirs. Further, a fee simple, unlike a fee tail, could not, and cannot, be limited to a particular sex. That is, "to A and his heirs male" merely conferred, and continues to confer, an ordinary fee simple upon A.

(a) Nature of the Fee Simple Estate

In the expression "to A and his heirs", the words "and his heirs" conferred no estate upon the heir. A living person could not have an heir, only an heir presumptive or an heir apparent: nemo est haeres viventis.[1] Apart from this, these words were construed as words of limitation and not as words of purchase: that is, they limited or defined the estate to be taken by A, but did not in themselves confer an interest upon any other person. In early times, when this estate acquired its name, it seems a different view prevailed. For at this stage the heir of the donee of an estate in fee simple was apparently regarded as having a definite interest in land. That is, the words "and his heirs" were then construed as akin to words of purchase. Thus at one time the tenant in fee simple was, it seems, unable to alienate his land without the consent of his heir.[2] From about 1200, however, this restriction on the tenant's power of disposition disappeared, and the words "and his heirs" thenceforth became accepted as words of limitation.

Originally the duration of an estate in fee simple appears to have been limited to the time during which the original tenant or any of his heirs survived. It became, therefore, common practice to limit the estate not merely to A "and his heirs", but rather to A "and his heirs and assigns".[3] But the word "assigns" was not necessary.[4] And this practice disappeared when it became established that, whether or not assigns had been so named, if a fee simple estate was alienated, its duration became dependant on the survival of the heirs of the tenant for the time being.

(b) Alienability

Over the course of time the nature of the fee simple estate has been radically transformed. In its incidents, including the power of alienation, the fee simple estate is today, for all practical purposes, equivalent to absolute ownership. Full powers of disposition, both inter vivos and by will, have been conferred by statute:[5] and succession on intestacy is now controlled by the Succession Law Reform Act, 1977.[6]

1. See, In re Cleator (1885), 10 O.R. 326, 334 (C.A.).

2. See p. 1.1.12

3. Pollock and Maitland, The History of the English Law, (1968), 2d ed., vol. ii, 14.

4. Ahearn v. Ahearn (1894), 1 N.B. Eq. 53.

5. See pp. 1.1.12-1.1.14

6. S.O. 1977, c. 40.

RE MacINNIS AND TOWNSHEND
(1973), 35 D.L.R. (3d) 459 (P.E.I. S.C. in Banco)

Trainor, C.J., in delivering the judgment of the Court:

...

The background of the case is that George Neil MacDonald, being the owner of the lands above described by his last will and testament, dated February 17, 1949, devised the same to Etta Mooney, and Blanche C. MacDonald in equal shares. By the executor's deed of September 11, 1951, the said lands and premises were duly conveyed to the said Etta Mooney and Blanche C. MacDonald as tenants in common thereby giving to each of them an undivided half-interest in fee simple.

The said Etta Mooney, by her last will and testament dated November 6, 1952, devised the said lands and premises as follows:

> To my sister Blanche C. MacDonald, single woman, of Souris aforesaid, all my real and personal property of whatsoever I am possessed of at the time of my death, to be used and disposed of as she wishes during her lifetime and that any that is left at her death it shall go to my niece, Rose A. MacDonald daughter of my brother Andrew MacDonald.

The first question to be decided is whether the will gave to Blanche C. MacDonald the full estate in the real property or only a life interest subject to a full right of disposal in her lifetime.

. . .

In *Re Walker* (1925), 56 O.L.R. 517, the principle was stated by Middleton, J.A., at p. 521 as follows:

> From the earliest times the attempt has been made to accomplish the impossible, to give and yet to withhold, to confer an absolute estate upon the donee, and yet in certain events to resume ownership and to control the destiny of the thing given. By conveyance this is impossible. Where there is absolute ownership, that ownership confers upon the owner the rights of an owner and restrains an alienation; and similar attempts to mould and control the law are void: *In re Rosher* (1884), 26 Ch. D. 801.

Again at p. 522 he says:

> When a testator gives property to one, intending him to have all the rights incident to ownership, and adds to this a gift over of that which remains in specie at his death or at the death of that person, he is endeavouring to do that which is impossible. His intention is plain but it cannot be given effect to. The Court has then to endeavour to give such effect to the wishes of the testator as is legally possible, by ascertaining which part of the testamentary intention predominates and by giving effect to it, rejecting the subordinate intention as being repugnant to the dominant intention.

Counsel has referred to a large number of other cases recognizing the principle by Canadian Courts. But we do not deem it necessary to set forth any analysis of them. They all seem to support the contention of counsel for the appellants that the words, "to be used and disposed of as she wishes during her lifetime" conferred upon the said Blanche C. MacDonald the full title in fee simple to the lands of which the said Etta Mooney died possessed and that the proposed gift over of any that is left was void as an attempt to cut down the interest of the said Blanche C. MacDonald to a life interest with power to dispose in her lifetime.

. . .

NOTE: For a discussion of the meaning of the word "fee" in the context of The Planning Act, R.S.O. 1970, c. 349, see Re Forfar and East Gwillimbury (1971), 20 D.L.R. (3d) 377 (Ont. C.A.), aff'd (1972), 28 D.L.R. (3d) 512 (S.C.C.).

See also, Re Paithouski (1978), 83 D.L.R. (3d) 284 (Ont. C.A.); Re Lachowski (1977), 75 D.L.R. (3d) 527 (Ont. H.C.).

Section 2 DESCENT ON INTESTACY OF AN ESTATE IN FEE SIMPLE

The issue of the alienability of land has been discussed above: see 1.1.12 - 1.1.14. Reference has there been made, inter alia, to the statute Quia Emptores. It is here proposed, in D'Arundel's Case, Brac. N.B. 1054 (1225), to refer briefly to the judicial attitude to alienation of land by deed inter vivos. It is then proposed to set out material to raise the issue of the position of children born out of wedlock and finally, the consequences of an intestacy.

D'ARUNDEL'S CASE, Brac. N.B. 1054 (1225)

Radulf the son of Roger sought against William of Arundel five acres of land in Trelley, three acres in Treberned, two acres in Tredeiset and one acre in Hendrie and their appurtenances of which Roger his father was seized in law and in feudal services in the time of Lord Henry the King, and which descended from Roger by the law of the land to this same Radulf as his son and heir.

And William came and defended his right, and said that the same Roger, the father, conveyed with quiet enjoyment all the land and its appurtenances to William, the father of William, in the King's Court all his right and inheritance therein; to William and his heirs solely and free from himself and his heirs forever, and offered a deed of Roger by which these things were attested.

And Radulf came and admitted the deed of his father and covenant of quiet enjoyment, but asked judgment whether his father could convey all the land which he held by military tenure, retaining no service to himself and his heirs.

And since Radulf admitted his father's deed and it was attested by the deed that his father Roger conveyed all his land and warranted quiet enjoyment from his heirs, it was adjudged that William should go in peace and Radulf be in mercy.

Laskin, Cases and Notes on Land Law

pp. 45-48, Rev. ed., (1964).

IT HAS ALREADY been pointed out that at common law, land (or, more accurately, interests in land) descended to the "heir", under a principle of primogeniture. Moreover, descent was traced from the person who was last actually seised—*seisina fecit stipitem*—and not from the person last entitled. This situation prevailed until changed by legislation in the nineteenth century (see Inheritance Act, 1833 (Imp.), c. 106); and with the assimilation in many of the provinces of Canada of real to personal property for purpose of intestate administration and the enactment of statutory rules of distribution, the principle referred to became meaningless. In the developed common law, inheritance of interests in land was by lineal descendants and, failing any, then by collaterals; lineal ascendants were excluded. Precedence among lineal descendants was determined under the following rules (as set out in 2 *Pollock and Maitland*, History of English Law, 2nd ed., p. 260): (1) a living descendant excludes his or her own descendants; (2) a dead descendant is represented by his or her own descendants; (3) males exclude females of equal degree; (4) among males of equal degree only the eldest inherits; (5) females of equal degree inherit together as co-heiresses; and (6) the rule that a dead descendant is represented by his or her descendants overrides the preference for males, so that a granddaughter by a dead eldest son will exclude a younger son.

by Lord Cairns in *Hill v. Crook*, so that the *prima facie* interpretation of the word "children" as including only legitimate children is rebutted and John McLaughlin is entitled to the residue of the estate under cl. 5 of the will.

In fairness to counsel for the next of kin, I should make reference to two other decisions of this Court which were cited to me, both of which pre-date the *Re Nicholls* decision: *Re Brand*, [1957] O.W.N. 26, 7 D.L.R. (2d) 579 (a decision of Kelly, J.), and *Re Herlichka*, [1969] 1 O.R. 724, 3 D.L.R. (3d) 700 (a decision of Osler, J.) In each case the Court declined to interpret the testamentary use of the word "children" as including illegitimate children.

Re Brand presents little difficulty here since it is easily distinguishable on its facts. As in the present case, the testatrix directed that the residue of her estate being divided among the surviving children of her daughter and, again, only illegitimate children answer to this description at the time the provision became effective. However, in that case, the surrounding circumstances were of no assistance, or rather led to a very different interpretation since the daughter had married in 1920, one year prior to the making of the will in question and in 1924 she gave birth to a legitimate child (who predeceased the testatrix).

I must confess that *Re Herlichka* gives me much more difficulty. In that case Osler, J., was called upon to interpret several provisions of a will referring to "my wife" and "my children" in circumstances where the testator was survived by a legal wife and two legitimate children (whom he had deserted 11 years before his death) and also by a so-called common law wife and the three illegitimate offspring of that relationship. Mr. Justice Osler, after noting (at [1969] 1 O.R. 724 at p. 730) "the very strong preference consistently shown by the Courts for the *prima facie* meaning of 'children' as being legitimate children exclusively", found that "wife" in the case before him meant "legal wife" and "children" meant legitimate children. He made these findings notwithstanding that, in my respectful opinion, the testator's intention to benefit his "common law" wife and their children was clear both on the face of the will and from the surrounding circumstances. With all deference, I must say that, were I called upon to decide *Re Herlichka*, I would have been impelled to a different result. (I am given to understand that that case was settled while an appeal was pending.) I refer again to the commentary of Professor Hogg in 1972 in 50 *Can. Bar Rev.* 531.

In the result, I find that under cl. 5 of the will John McLaughlin is entitled to the residue of the estate of Katherine Maud McLaughlin. Costs of all parties to be paid out of the estate on a solicitor-and-client basis.

Incidentally, whether or not it has any direct application to this case, it may be of interest to note the decision of Labrosse, J., in *Plummer et al. v. Air Canada et al.* (1976), 12 O.R. (2d) 446, 69 D.L.R. (3d) 238 [affirmed 15 O.R. (2d) 634, 76 D.L.R. (3d) 426], where he held that an illegitimate child is a preferred beneficiary within the meaning of the word "children", in Part V of the *Insurance Act* as it existed immediately prior to July 1, 1962. I understand that decision has been upheld in an as yet unreported but recently released oral decision of our Court of Appeal. Perhaps this whole subject may now rest on a new footing.

Judgment accordingly.

Note: In Plummer v. Air Canada (1977), 69 D.L.R. (3d) 238, (Ont. H.C.) the deceased had changed the beneficiary under his life insurance policy from his wife to his infant illegitimate son. The wife had never consented to the change of beneficiary. The issue arose as to whether this illegitimate son was a preferred beneficiary within the meaning of Section 164(2) of the Insurance Act, R.S.O. 1960, c. 190, since only then could the deceased have so changed the beneficiary from his wife. The issue turned upon the meaning of the word "children" within this sub-section. Labrosse, J. held that this word encompassed illegitimate children and accordingly, the infant son was entitled to the proceeds of the policy. An appeal from this decision was dismissed: (1977), 26 D.L.R. (3d) 426 (C.A.).

CHAPTER 9

DEFEASIBLE ESTATES IN FEE SIMPLE

PROBLEM

In November, 1972, Tom conveyed, by deed, Blackacre "to John in fee simple so long as he does not run for public office". John used Blackacre to hold picnics for all the people in the neighbourhood. Perhaps as a result of this local following, in April, 1974, John was elected mayor of his municipality. Tom claims that he is now entitled to possession of Blackacre.

Discuss.

Section 1 GENERAL NATURE

DETERMINABLE FEE SIMPLE

This is a fee simple which according to the express terms of the limitation will automatically determine, before the full period for which it may possibly continue, on the occurrence of some event specified in the limitation which may never occur.

e.g. "To A and his heirs so long as York University exists".

i.e. the interest of A may continue for ever, if the specified event occurs - the University ceases to exist - the fee simple automatically determines and the land reverts to the grantor. The grantor is said to have a "possibility of reverter".

i.e. a possibility of acquiring a vested estate at some future time.

It has been contended that the grant of a determinable fee simple, as it leaves a possibility of reverter in the grantor, would create a relationship of tenure between the grantor and the grantee of the fee simple, and is thus contrary to the Statute of Quia Emptores.

A Fee Simple subject to a condition

On the grant of a fee simple a condition may be attached on breach of which the estate given to the grantee may be cut short - e.g. to A and his heirs on condition that A does not marry B. If A marries B, the grantor may put an end to the estate. At first sight, a determinable fee simple and a conditional fee simple may appear difficult to distinguish. Essentially it is a matter of terminology: in a determinable fee simple the determining event is made part and parcel of the limitation itself; in a conditional fee simple there is a grant of the fee simple to which a condition is attached. Generally the use of the words "so long as", "during' and "whilst" denote a determinable fee, whilst the use of such expressions as "provided that", "on condition that" or "but if" denote a conditional fee.

Substantial differences, however, follow from whether a limitation is a determinable or a conditional fee - e.g. a determinable fee will automatically end upon the occurrence of the determining event, whereas in the case of a conditional fee, breach of the condition does not automatically determine the estate, but merely gives the grantor a right of re-entry, which he may, or may not, exercise as he chooses.

The doubts expressed regarding determinable fees simple do not apply to conditional fees simple.

A FEE SIMPLE subject to Executory Gift over

The limitation of a fee simple may, in a grant to uses, be accompanied by what is called a shifting clause which provides that on the happening of some event the fee simple shall pass from the grantee to another person - shifting uses provide an example.

e.g. to X and his heirs to the use of A and his heirs but should B obtain a University degree to the use of B and his heirs. In this case A's fee simple is not absolute but liable to be divested in favour of B.

This type of fee simple is sometimes created by statute where land is vested in a particular body for a certain purpose, the Statute providing expressly or by implication that if the purpose fails, or the land ceases to be used for that purpose, the land shall revert to the original donor, or otherwise, as the case may be.

NOTE: A determinable fee simple and a fee simple subject to a condition can exist as a matter of common law. A fee simple subject to an executory gift over, however, is a product of statute: that is, such a limitation may be created by the Statute of Uses or by the terms of some other Act.

Megarry and Wade, The Law of Real Property

(1975), 4th ed., p. 82

4. A base fee. A base fee is a particular kind of determinable fee.[8] The two essentials of a base fee are: (*a*) it continues only so long as the original grantor or any heirs of his body are alive; and (*b*) there is a remainder or reversion after it. Such estates are more fully dealt with below.[9]

Nature of modified fees. The owner of a modified fee has the same rights over the land as the owner of a fee simple absolute: thus the common law refused to restrain him from committing acts of waste,[10] such as opening and working mines. Equity, on the other hand, intervened to prevent the commission of equitable waste, *i.e.*, acts of wanton destruction,[11] although the owner of a fee simple absolute is under no such restraint; for where there is a modified fee, there is some other person interested in expectancy whose interest may need protecting.

At common law the owner of a modified fee could not convey a fee simple absolute but merely a fee liable to determination, for a man cannot convey more than he has.[12] But these interests now fall within the statute law dealing with settlements, so that they are now subject to the statutory powers of making sales and other dispositions.[13] A modified fee may, moreover, become enlarged into a fee simple absolute, *e.g.*, by the determining event becoming impossible [14]; and there are special rules for the enlargement of base fees.[15]

NOTE: Section 22 of the Conveyancing and Law of Property Act, R.S.O. 1970, c. 85 is a provision relating to covenants that are annexed to and run with land. Section 22 provides that:

22. Every covenant made after the 24th day of March, 1950, that but for this section would be annexed to and run with land and that restricts the sale, ownership, occupation or use of land because of the race, creed, colour, nationality, ancestry or place of origin of any person is void and of no effect. R.S.O. 1960, c. 66, s. 22.

the statutory language is broad enough to permit me to remove the right. The words of the subsection, "the Supreme Court may make such order on the application as it considers just", confer a discretion on the Court to impose terms when removing a restriction. Given my understanding of the legislative intent reflected by the subsection and the obligation under s. 10 of the *Interpretation Act*, R.S.O. 1970, c. 225, to give it a fair, large and liberal interpretation, I decline to impose, as a term of the removal of the restriction, a requirement that the applicant offer to sell the property to the respondent for the sum of $2,600. In his affidavit the respondent states that it is his desire to retain the subject lands in his family. I would be inclined to give greater weight to that expressed wish if the adjoining lands were still the family farm, but they are not. According to the respondent's affidavit they are now owned and occupied by a construction company and are used for the storage of heavy construction equipment. The lands have been out of the control of the respondent's family for a very long time now and, moreover, are worth a great deal more than the amount the respondent has offered to pay for them. In the light of their long public use, I do not think it would be just to that portion of the public sector of society represented by the applicant to require the applicant to dispose of the property at such a large undervalue. On the other hand, I do think that it would be just to permit the respondent to purchase the lands if he is prepared to pay for them the fair market value. For these reasons, I make an order removing the restriction as set out in the deed dated March 21, 1925, and registered in the Registry Office of the County of Essex on May 21, 1925, as instrument No. 27186, but it is a term of that order that the applicant forthwith offer to sell the lands to the respondent at a price equal to their fair market value as of the date of the offer.

Order accordingly.

Note: In Re Tilbury West Public School Board and Hastie (1966), 55 D.L.R. (2d) 407 (Ont. H.C.), the form of the grant was as follows:

> DOTH GRANT unto the said parties of the Third Part and their [heirs and assigns FOR EVER]: Successors as Trustees for so long as it shall be used and needed for school purposes and no longer.

The habendum was as follows:

> TO HAVE AND TO HOLD unto the said parties of the Third Part, and their Successors [heirs and assigns to and for] as Trustees so long as used for school purposes [their sole and only use for ever], SUBJECT NEVERTHELESS, to the reservations, limitations, provisoes and conditions expressed in the original Grant thereof from the Crown. — also when the said piece or parcel of land is no longer used for school purposes it shall be returned to the owner of the said south half of lot number One North Range Middle Road Tilbury West.

Added to the usual covenant for quiet possession were the following words: "so long as used for school purposes and no longer". The release clause in the usual form had added to it: "except when no longer used or needed for school purposes". In the course of his judgment, Grant, J. applied the tests used in determining whether a grant is a fee simple determinable or a fee simple upon condition subsequent, as follows:

Other conditions which are contrary to public policy, and therefore void, are conditions requiring the donee to acquire a dukedom [88] (as being a title carrying with it legislative rights), or forbidding entry into the naval or military services,[89] or the undertaking of any public office.[90] A donee may be forbidden to dispute a will, but such a condition is void if drawn so widely as to disable the donee from protecting his rights.[91] A condition may forbid a change of religion,[92] but only in the case of an adult: for otherwise it conflicts with the parent's duty to provide proper religious instruction for his child.[93] A condition that X should not be allowed to set foot on the property has been held good.[94]

(4) DETERMINABLE FEES. A determinable fee, on the other hand, is not so strictly confined[95]; "if the gift is until marriage, and no longer, there is nothing to carry the gift beyond the marriage."[96] A devise of freeholds on trust for X "until he shall assign charge or otherwise dispose of the same or some part thereof or become bankrupt . . . or do something whereby the said annual income or some part thereof would become payable to or vested in some other person" has been held to give X a determinable fee.[97] On any of the events occurring X's estate would determine; if he died before any of them occurred, the fee simple would become absolute, for it ceases to be possible for any of them to occur.[98] But although a fee may thus be made determinable on alienation or on bankruptcy or on similar events, a limitation would probably be void if it were contrary to public policy for the fee to be determinable on the stated event, *e.g.*, if the event were the return to her husband of a wife who was separated from him.[99] In such a case the whole gift fails, for there is no proper limitation; whereas a corresponding conditional gift would become absolute, since the fee is properly limited even though the condition fails.[1]

(*e*) *Alienability of the expectancy.* At common law a right of entry and a possibility of reverter were descendible but not alienable *inter vivos*, for they were not themselves estates but merely special rights incident to other estates.[2] Nor did they become devisable by the Statute of Wills, 1540. But rights of entry for condition broken were made devisable in 1837[3] and alienable *inter vivos* in 1845.[4] They may also now be made exercisable by any person,[5] not merely by the grantor or his successors in title, so that they may now be given to some other person at the moment of their creation. It is not quite so clear that a possibility of reverter is devisable[6] or assignable, but it seems highly probable that it is, at least after 1925.[7]

NOTE: In the materials that follows, an attempt has been made to discuss cases under various headings. A reading of the cases reveals, however, that a clear cut distinction in subject matter is not always possible. As will be noted, some cases are concerned with more than one relevant issue.

NOTE: A Statutory Provision

Property Law Act, 1952 (N.Z.)

33. Alienation of property may be restricted—(1) It shall be lawful by will, or by a settlement made on marriage, to provide that any estate or interest in any property comprised in the will or settlement devised, bequeathed, settled, or given to any beneficiary, whether male or female, shall not during the life of that beneficiary be alienated, or pass by bankruptcy, or be liable to be seized, sold, attached, or taken in execution by process of law.

(2) "Beneficiary" for the purposes of this section is limited to children or grandchildren of the testator, or, in the case of a settlement, of the husband and wife:

Provided that for the purposes of this subsection a person shall be deemed to be the child or the grandchild, as the case may be, of a testator notwithstanding that he is related to him only illegitimately.

(3) Nothing in this section shall prevent any lawful restraint on alienation of property from being imposed by will or settlement.

(4) The Court may in any case where it appears to be for the benefit of the person subject to any restraint on alienation either wholly or partly remove the restraint.

Re Hardley

[1977] 1 N.Z.L.R. 161 (N.Z.S.C., in Chambers)

BARKER J. This is an application under s 33(4) of the Property Law Act 1952 to remove the restraint upon alienation contained in cl 9 of the will of Walter Frederick Hardley late of Auckland, company director, deceased (hereinafter called "the deceased"). The application is brought ex parte by the trustees of the deceased's estate.

Section 33 (1) of the Property Law Act makes it lawful for a will or marriage settlement to provide for a restriction on alienation during the lifetime of a beneficiary. Section 33 (4) provides:

> "The Court may in any case where it appears to be for the benefit of the person subject to any restraint on alienation either wholly or partly remove the restraint".

The history of the section and how it differs from the common law situation was discussed by Herdman J in *Re Wilson* [1934] NZLR s 49. There appears to be no similar provision to s 33 (4) in the United Kingdom.

The effect of removal of the restraint upon alienation in this case will be to enable the sole surviving child and the 10 grandchildren of the deceased who are all sui juris to enter into a deed of family arrangement. All have signed the proposed deed subject to the court's making the order presently sought. The estate of the deceased is substantial.

The deceased died on 12 March 1936, and was survived by his widow and four children. His will was a lengthy document which provides inter alia for life interests, the last of which is to continue until the death of his last surviving child, who is now well beyond child-bearing years. At that date, the capital of the estate is to be distributed in equal shares between the grandchildren of the deceased then living. His grandchildren are all married, with families of their own; they wish to receive some capital benefit from the estate whilst their needs are greatest. Clause 9 of the will, which prevents them from so doing, and which is permissible by virtue of s 33 of the Property Law Act 1952, reads as follows:

> "I Declare that the respective shares of my said children and grandchildren under this my will shall not be liable to be anticipated alienated charged mortgaged or encumbered nor shall they during their respective lives pass in bankruptcy or be liable to be seised sold attached or taken in execution by process of law".

CHAPTER 10

THE ESTATE IN FEE TAIL

Problem

In November, 1954, John died. His will contained the following devises:

(1) Blackacre "to Jim and the heirs of his body."

(2) Whiteacre "to Tom and his children".

(3) Greenacre "to Peter and the heirs female of his body".

(4) Redacre "to Dick, but if he die without issue, to Harry."

What interests, if any, were taken by Jim, Tom, Peter, Dick and Harry.

Jim wishes to dispose of his interest to Paul. Advise Jim.

Had John died in 1958, what interests, if any, would have been taken by Jim, Tom, Peter, Dick and Harry.

SECTION 1 General Nature and Abolition

NOTE:

As with an estate in fee simple, an estate in fee tail is an estate of inheritance.[1] The words "in fee" do not necessarily mean in fee simple: an estate tail is accurately described as a "fee tail" and the words "in fee" may mean "in fee tail".[2] Unlike an estate in fee simple, the estate tail is not inheritable by heirs general; for the class of heirs capable of inheriting is restricted to lineal descendant heirs. Moreover, again unlike a fee simple, an estate tail could be limited so as to descend only to the lineal descendant heirs of a particular sex; for example, a fee tail male.[3] The grant of a fee tail does not exhaust the donor's interest; it is a lesser estate than a fee simple and the donor retains the fee simple estate in reversion.

(a) Nature of the Fee Tail Estate

Originally the fee tail did not exist as a separate estate. A grant to a man and the heirs of his body was construed by the courts as a conditional fee, the condition being the birth of issue. Once issue were born the condition was performed and the donee had the same powers of alienation as if he had originally been granted a fee simple. If, however, the condition was not fulfilled by the birth of issue, then, on the donee's death, the estate reverted to the donor. The intention of the donor was that land should be enjoyed by the donee during his lifetime, and that upon his death it should pass to his heir and so on, ad infinitum, reverting to the donor, or his heir, if the line of descent of the donee should cease. The construction put on such limitations by the courts, while in furtherance of the view increasingly adopted by the common law that all land should be freely alienable, frustrated the wishes of the donor, in that upon birth of issue capable of inheriting, the donee could alienate the land, defeating the expectations of his descendants and also the reversion of the donor.

The reaction against this construction by the courts resulted in the Statute De Donis Conditionalibus, 1285.[4] This Act provided that the intention of the donor, according to the form manifestly expressed in the deed of gift, should be observed; so that the donee should have no power to alienate the land so as to defeat the expectations of his issue, but that it should remain to his issue after his death, or, upon failure of issue, revert to the donor. Although the Statute did not expressly create a new estate, so great was its impact that thereafter conditional fees of the type here discussed were re-named estates in fee tail.[5] The effect of the Statute was to enable land-owners to tie

1. At common law the effect of an attempt to create an estate tail in personalty was to give an absolute interest to the first taker: see, In Re McDonald (1903), 6 O.L.R. 478 (C.A.); Re Sutherland (1911), 2 O.W.N. 1386 (H.C.).

2. Re Taylor (1916), 28 D.L.R. 488, 492 (Ont. C.A.).

3. For example, Re Brown and Slater (1903), 5 O.L.R. 386 (H.C.). Also, Riddell v. McIntosh (1885), 9 O.R. 606 (H.C.).

4. See, Appendix A to the Revised Statutes of Ontario, 1950; and see the repealing provisions of The Real Property Amendment Act, S.O., 1956, c. 76.

5. But see, Ernst v. Zwicker (1897), 27 S.C.R. 594, where at p. 622, King J., with whom Taschereau and Sedgewick JJ. agreed, stated: "Practically there was no substantial difference between a fee simple conditional at common law and an estate tail under the statute de donis, but they were, however, none the less, different estates."

RE BROWN and CAMPBELL
(1898), 29 O.R. 402 (H.C.)

STREET, J.:—

I am of opinion upon the facts stated in the case submitted that Joseph Lewis Barkey took an estate tail, under the will of his grandfather Joseph Barkey, in the lands in question. The devise is to Joseph Lewis Barkey his heirs and assigns forever, with a qualification in the following words: "Provided always nevertheless that in the event of my said grandson Joseph Lewis Barkey, dying without leaving any lawful heirs by him begotten," then the property is to go to other persons.

The question is whether the words "dying without leaving any lawful heirs by him begotten," are within the 32nd section of the Wills Act R. S. O. ch. 128; and I am of opinion that the authorities require me to hold that they are not.

The English Wills Act was passed in the 1st year of Her Majesty's reign and contains a provision of which ours is a transcript. The decisions upon it have been few, but the accepted construction seems to be that it is to be construed strictly and confined to cases in which the word "issue," or some word of precisely the same legal meaning, is used, and that it does not extend to cases in which the word "heirs" is used, even although under the circumstances the words "issue" and "heirs" should relate to the same class. In other words, that the statute was intended to correct errors supposed to arise from the use of the word "issue," but was not intended to apply to cases in which the technical word "heirs" though coupled with words of procreation was used. Such was the construction plainly placed upon the English section by the Lords Justices in *Dawson* v. *Small* (1874), L. R. 9 Ch. 651, a case which has never been doubted during the twenty-four years that have elapsed since it was decided and which must, I think, be treated as having established a rule of construction only to be altered by the Legislature. See also to the same effect *Re Sallery* (1861), 11 Ir. Ch. Rep. 236; *Harris* v. *Davis* (1844), 1 Coll. 416; Jarman on Wills, 5th ed., p. 1322. See also *Re Edwards*, [1894] 3 Ch. 644; Theobald on Wills, 3rd ed., pp. 494-5.

The estate tail acquired by Joseph Lewis Barkey under this will has been converted into an estate in fee simple by the conveyance to Florence Barkey which she conveyed to the petitioner.

The question submitted must therefore be answered in favour of the petitioner and the costs of the petition as agreed by the parties will be paid by the vendor.

NOTE: In Re Stark and Trim, [1932] 2 D.L.R. 603 (Ont. C.A.), the testator left his estate "to my son William James Stark ..., and at his death if he has no lawful issue, then the property is to be sold ..." The testator then stated what was to be done with the proceeds of sale, should it occur. The Ontario Court of Appeal held on construction of the will, that William Stark received a fee simple which became indefeasible on the birth of lawful issue. The Court held that it was not necessary for lawful issue to be living at the death of William Stark, to make the fee simple indefeasible.

CHAPTER 11

THE LIFE ESTATE

Problem:

John held the fee simple estates in Blackacre, in Whiteacre, in Redacre and in Blueacre. In 1972, John conveyed Blackacre "to Jim". In 1973, John conveyed Whiteacre "to Tom in fee simple". In 1974, John died. By his will, John devised Redacre and Blueacre in this way:

> "I devise the use and occupation of Redacre to Dick."
>
> "I devise Blueacre to Harry so long as his wife, Jane, shall live. After the death of Jane, I devise Blueacre to Paul for ever."

Harry, who predeceased Jane, died in 1975.

In the alternative, assume that, in 1968, Jane had left Ontario and had taken up residence in British Columbia. And assume further that, despite reasonable inquiries by Paul, Paul is, at present, unable to ascertain whether Jane is alive or dead. But Paul has been told that Jane was killed in an air crash in 1975. Harry is still living on Blueacre and, in spite of Paul's request to do so, he has refused to vacate Blueacre.

Discuss.

Section 1 INTRODUCTION

Unlike the fee simple estate and the estate in fee tail, a life estate is not an estate of inheritance. It is an estate that is limited to exist for a period of time measured by one or more lives.

(a) Right to Possession

A life estate carries with it the right to possession; that is, if the estate is a possessory estate and if the life tenant is entitled thereto both at law and in equity. A trust may, however, be created. The legal estate may be vested in trustees and the tenant may hold only an equitable life estate. In this event, the tenant for life cannot claim possession as a matter of right: where equitable estates are concerned, the right to give "possession to the life-tenant is discretionary with the court ..."[1] This issue has arisen in the context of the construction of wills. The general rule appears to be that, in the simple case of a trust to pay rents and profits to a devisee, such devisee is entitled in equity to possession; but, the court will not give possession to the cestui que trust, where doing so would do violence to the intentions of the testator.[2] Accordingly, where special provisions of a will have manifested the testator's wish that the management and control of the devised property was to be with trustees, the court's discretion has not been exercised in favour of the life tenant, and he has been held not entitled to possession.[3] Absent, however, such provisions, possession has been granted to the life tenant. This occurred in Hefferman v. Taylor, where Boyd C. stated:[4]

> But no such context is to be found in this will - those entitled in remainder are the adult children of the life tenant and no active duties are cast upon the trustees during the continuance of the life estate. Such being the case the Court will give effect to the usual incidents of an estate for life by which the tenant can occupy or let or otherwise dispose of it as seems best to that tenant.

It appears that the right to manage the land in question follows consequentially upon a finding of entitlement to possession.[5] At any rate, the same determining factor seems applicable; namely, the testator's intention. Thus, where it was not the personal occupancy, but only the management and control of the property that was sought by the life tenant, the Court stated that the will manifested the wish of the testator that such management and control should rest with the executors and held, accordingly, that they were entitled to exercise control and management, as against the life tenant.[6]

1. Re Cunningham (1917), 12 O.W.N. 268 (H.C.), at p. 269 per Masten J.

2. Whiteside v. Miller (1868), 14 Gr. 393. Also, Orford v. Orford (1884), 6 O.R. 6 (Ch. D.).

3. Homfray v. Homfray (1936), 51 B.C.R. 287 (B.C.S.C.); Whiteside v. Miller (1868), 14 Gr. 393; Orford v. Orford (1884), 6 O.R. 6 (Ch. D.). Also, Re Cunningham (1917), 12 O.W.N. 268 (H.C.).

4. (1888), 15 O.R. 670, 672 (Ch. D.).

5. Whiteside v. Miller (1868), 14 Gr. 393, 401; Orford v. Orford (1884), 6 O.R. 6, 10 (Ch. D.).

6. Re Cunningham (1917), 12 O.W.N. 268 (H.C.).

NOTE: See also, the following cases. In Humans v. Doyon, [1945] 2 D.L.R. 312(Ont.C.A.) a grant to X for "as long as he wants" was held to create a tenancy at will and not a life estate. In Lapointe v. Cyr (1952), 29 M.P.R. 54 (N.B.S.C., T.D.) a written agreement under seal, Cyr agreed with Lapointe to "keep Hector Lapointe on my farm... as long as he wants to live on my farm and cultivate and manage my farm as he did in the past". The New Brunswick Supreme Court held that this agreement conferred a life estae in the farm upon Lapointe. In Pettigrew v. Durley (1972), 5 N.B.R. (2d) 834 (N.B.S.C., T.D.), the will of a testatrix contained the following devise: "...subject further to the right of my daughter, Helen Marie Pettigrew...to have the use and occupation of the flat in which I presently reside in the said property, subject to my said daughter Helen Marie Pettigrew, paying one third of the expenses in connection with the said property as hereinabove set out." The Court declared that this devise created a life interest in the flat referred to, subject to payment of one-third of the items listed in the will. In Unrau v. Barrowman et al. (1967), 59 D.L.R. (2d) 168 (Sask. Q.B.), a letter to the plaintiff containing the words "you are occupying the quarter section as a squatter and this Branch is prepared to allow you to continue to do so as long as you remain in residence" was held to create a life tenancy which would terminate, apart from surrender, only on the death of the plaintiff or on his vacating the land. In Treadwell v. Martin (1976), 13 N.B.R. (2d) 137 (N.B.S.C., App. Div.), it was held that a deed which reserved to the grantor "a home in the said lands and premises for the remainder of her natural life" created only a personal right and not an interest in property. In Re Amos, Carrier v. Price, [1891] 3 Ch. 159 (H.C.), it was held that a grant on the condition "that the property be left to him for his life and for the life of his heir, after which it became the property of X" was a limitation to the tenant for two lives, the lives being that of the grantee and of his heir.

Section 3 Creation by Operation of Law

As earlier noted, at common law, land descended upon intestacy to the "heir". As a general rule, a widow or widower would not be closely enough related in blood to qualify as the heir: this would be precluded by the rules of consanguinity that related to marriage. In recognition of this fact, and to provide on intestacy for a widow and widower, the common law created the concepts of dower and curtesy, respectively.

By statute, succession rights upon intestacy have long been conferred upon a surviving spouse: see now, Part II of the Succession Law Reform Act, 1977. To the extent indicated below, curtesy and dower have recently been abolished. The abolition of these concepts has been accompanied by the introduction, in the Family Law Reform Act, 1978, of a new scheme of property relations between husband and wife. Some aspects of this scheme of property relations is briefly metioned in Volume III.

(a) Curtesy

(i) The Concept Stated

The development of the law in relation to husband and wife has been conditioned by the canonist conception of marriage as a sacrament, the result of which was to make husband and wife one flesh. From this there developed the principle (traced to as early as the latter half of the twelfth century) that by marriage husband and wife became one person in the eyes of the law.[1] Although never completely true, this "well-established maxim"[2] produced widespread effects upon the law and led to the not unjustifiable cynicism that that one was the husband. Marriage at common law was regarded in the light of guardianship, a guardianship profitable to the husband.[3] Thus the property rights of a woman were drastically curtailed upon marriage. Marriage worked a gift of the wife's personal chattels to her husband. A husband could reduce into possession his wife's choses in action, whereby they became his absolutely: but, if he did not so reduce her choses in action into possession, the wife, on her husband's death, became entitled to them once again by survivorship. If his wife possessed leasehold properties a husband could, during the marriage, sell them and pocket the proceeds of sale, and if his wife predeceased him such property became his by right of marriage. Moreover, by marriage a husband acquired the sole right to manage, and became entitled to the income of, any freehold property owned by his wife. As is discussed below, the relationship of a husband to the freehold property owned by his wife, constituted curtesy.

The rules of the common law, whereby upon marriage a wife's property rights were severely curtailed in favour of her husband, were greatly tempered by the development in equity in the eighteenth century of the doctrine of the married woman's separate estate. By this doctrine, property could be conveyed to trustees for a married woman's separate use, in which event such property remained, in equity, the property of

1. Minaker v. Minaker, [1949] S.C.R. 397, [1949] 1 D.L.R. 801 (S.C.C.); Allen v. Nolet and Nolet (1967), 61 D.L.R. (2d) 743 (B.C.C.A.); Grove v. Lively, [1953] 3 D.L.R. 522 (N.S.S.C, T.D.). See also, Co. Litt. 112; Bl. Comm. (7th ed., 1775), vol. i, p. 442.

2. Phillps v. Barnet (1876), 1 Q.B.D. 436 (H.C.) at p. 440.

3. Pollock and Maitland, The History of English Law (2nd ed., 1911) vol. ii, p. 406; Graveson, Status in the Common Law (1953), pp. 21-24.